Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN LAMBERT, SUPERINTENDENT,
WASHINGTON STATE PENITENTIARY,

Petitioner,

v.

GARY BENN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Gary Benn, *Petitioner-Appellee,* v. John Lambert, Superintendent of the Washington State Penitentiary, *Respondent-Appellant.*	No. 00-99014 D.C. No. CV-98-05131-FDB OPINION

Appeal from the United States District Court
for the Western District of Washington
Franklin D. Burgess, District Judge, Presiding

Argued and Submitted
November 5, 2001—Pasadena, California

Filed February 26, 2002

Before: Stephen Reinhardt, Stephen S. Trott and
William A. Fletcher, Circuit Judges.

Opinion by Judge Reinhardt;
Concurrence by Judge Trott

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals affirmed a judgment of the district court. The court held the prosecution's suppression of critical impeachment evidence that could have been used to undermine the key prosecution witness's credibility in a capital case, including evidence of the witness's criminal misconduct and repeated lies to the police, while acting as an informant, constitutes a violation of a defendant's due process rights.

Appellee Gary Benn shot his half-brother, Jack Dethlefsen, and his half-brother's friend, Michael Nelson. Benn was charged with two counts of premeditated murder with the aggravating circumstance that the murders were part of a common scheme or single act, and was given notice of the government's intention to seek the death penalty. Benn claimed that the shootings were in self-defense after a spontaneous argument between Benn and Dethlefsen. The prosecution, however, contended that Benn had planned the killings primarily in order to cover up his participation with the victims in an arson-insurance-fraud scheme.

At trial, the prosecution relied heavily on various inculpatory statements that Benn had allegedly made to Roy Patrick, a jailhouse informant who was in Benn's cell block while Benn was awaiting trial. Even though the prosecuting attorneys had taken their first statements from Patrick over a year before the trial, Patrick's identity was not disclosed to the defense until the day before trial when he was added to the witness list. The prosecutor lied to the defense and stated that Patrick's identity could not be disclosed because he was in a witness protection program. The prosecution failed to disclose: that Patrick, while acting as an informant, had stolen both drugs and money during drug busts and had lied to police about it; that a detective had written a deactivation memo stating that Patrick could no longer work as an informant because he could not be trusted to follow departmental rules; that Patrick, while acting as an informant, had broken into an evidence room and

stolen drugs, resulting in burglary and obstruction of justice charges being filed against him; that Patrick had smuggled guns into a prison where he was housed, concealed his own involvement, and then told prison officials of the presence of the weapons in an effort to have his sentence reduced; and that although Patrick testified at trial that he did not ever use drugs, he continually did so during his time as an informant. The prosecution also failed to disclose that Patrick approached the police a week before trial claiming that he had a videotape showing that Benn was involved in a killing that was part of a notorious unsolved murder case unrelated to the Dethlefsen-Nelson killings. The prosecution also failed to disclose that Patrick was given $150 to produce the tape, that he never did so, and that the detectives concluded that he was lying about the tape's existence and about Benn's involvement in the other murders. In addition, the prosecution failed to disclose exculpatory evidence related to the arson-insurance-fraud allegation. Benn was convicted of the murders and sentenced to death.

Benn's direct appeal to the Washington Supreme Court was denied. Benn's state habeas corpus petition was also denied by the Washington Supreme Court, which applied the rule in *Brady v. Maryland*, 373 U.S. 83 (1963), and found that the state's actions were not prejudicial. Benn's federal habeas petition was granted: the district court found that material evidence had been withheld in violation of Benn's constitutional rights.

The state appealed.

[1] The Anti-Terrorism and Effective Death Penalty Act (AEDPA) applied to Benn's petition. **[2]** Under AEDPA, a federal court may grant a writ of habeas corpus to a state prisoner only if the state court's decision is contrary to, or involves an unreasonable application of, clearly established federal law, as determined by the Supreme Court or is based on an unreasonable determination of the facts in light of the evidence presented in the state courts.

[3] Because the Washington Supreme Court applied the rule in *Brady*, a rule clearly established by controlling Supreme Court precedent, the state court ruling was properly

analyzed under the "unreasonable application" clause of AEDPA. [4] Under *Brady*, the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. Prejudice must result from the failure to disclose the evidence. [5] Evidence is deemed prejudicial, or material, only if it undermines confidence in the outcome of the trial.

[6] The *Brady* rule is not limited to cases in which the defense has made a pretrial request for specific evidence. *Brady* applies where the defense makes a general request for exculpatory evidence and even where the defense does not make a request for such evidence at all. The disclosure requirements set forth in *Brady* apply to a prosecutor even when the knowledge of the exculpatory evidence is in the hands of another prosecutor.

[7] The undisclosed impeachment evidence was substantial and was far more damaging to Patrick's credibility than the impeachment evidence available to the defense at trial. [8] Information that an informant had been unreliable in the past constitutes material impeachment evidence for *Brady* purposes. [9] The defense was not informed of Patrick's burglary and obstruction of justice charges, his fraudulent attempt to smuggle guns into a prison, or his multiple thefts of drugs and money; nor was it informed of the fact that Patrick provided false information to law enforcement. As a result, the jury was not told about Patrick's record of criminal misconduct while acting as an informant, or that he had repeatedly lied to the police.

[10] Evidence that Patrick continually used drugs while acting as an informant and that the police knew about this but chose not to prosecute him would also be relevant to show his bias. [11] Evidence that Patrick was using drugs during the trial would reflect on his competence and credibility as a witness. [12] Were there no other pieces of withheld evidence as to Patrick, it would still have to be held that the suppression of impeachment evidence about Patrick's criminal misconduct and repeated lies to the police, while acting as an informant, was, standing alone, sufficiently prejudicial to establish a *Brady* violation. When there is reason to believe that the jury

relied on a witness's testimony to reach its verdict despite the introduction of impeachment evidence at trial, and there is a reasonable probability that the suppressed impeachment evidence, when considered together with the disclosed impeachment evidence, would have affected the jury's assessment of the witness's credibility, the suppressed impeachment evidence is prejudicial.

[13] Patrick's lie about the videotape, standing alone, was also sufficient to constitute a *Brady* violation. This evidence could have been used to show that Patrick was willing to lie about Benn and even to accuse him falsely of murder, if doing so would result in even a minimal benefit to him. [14] The evidence was direct proof of Patrick's lack of credibility, and the failure to disclose his fabrication was prejudicial. [15] Analyzed collectively, the withheld impeachment evidence revealed that Patrick, a critical witness for the state, was completely unreliable, a liar for hire, and ready to perjure himself for whatever advantage he could squeeze out of the system. The suppression of the impeachment evidence undermined the confidence in the outcome of Benn's trial and was therefore prejudicial. The Washington Supreme Court's decision to the contrary was clearly erroneous and constituted an unreasonable application of clearly established Supreme Court law.

[16] The state's failure to disclose exculpatory evidence about the alleged arson also constituted a *Brady* violation, independent of the *Brady* violation that resulted from the state's suppression of impeachment evidence. The state court ruling regarding the exculpatory evidence was clearly erroneous and thus constituted an unreasonable application of clearly established Supreme Court precedent. [17] The district court's decision granting Benn's petition for a writ of habeas corpus had to be affirmed.

Judge Trott concurred, writing that such reprehensible prosecutorial conduct as unlawfully withholding patently damaging impeachment evidence shames our judicial system.

COUNSEL

Suzanne Lee Elliott, Esq. & David B. Zuckerman, Esq., Seattle, Washington, for the petitioner-appelee.

John J. Samson, Esq. & Donna H. Mullen, Esq., Assistant Attorneys General, Olympia, Washington, for the respondent-appellant.

OPINION

REINHARDT, Circuit Judge:

The State of Washington, through the superintendent of the Washington State Penitentiary, appeals the district court's decision to grant Gary Michael Benn's habeas corpus petition, arguing that the district judge erred in holding that the Washington State Supreme Court decision was contrary to or involved an unreasonable application of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Because we hold that the state court's decision that there was no *Brady* violation in Benn's case constitutes an unreasonable application of clearly established Supreme Court law, we affirm.

I. FACTUAL BACKGROUND

On February 10, 1988, Gary Michael Benn made a 911 call to the Pierce County Sheriff's Department from the home of his half-brother, Jack Dethlefsen, and reported finding his half-brother's body as well as the body of his half-brother's friend, Michael Nelson. Officer Junge of the Pierce County Sheriff's Department arrived at the scene three minutes later and observed the bodies of the two victims on the floor in the living room. Both men had been shot once in the chest and once in the back of the head. He checked them for vital signs and found none. The bodies were still warm and bleeding, suggesting that both men had been killed recently.

There was a bullet hole in the couch in the living room consistent with someone having been shot while on the couch. There were also bloodstains that matched Dethlefsen's blood type on both the couch itself and on a newspaper that was on it. The medical examiner testified that Dethlefsen was shot in the chest while on the couch because only the chest wound would have allowed him to move around and end up on the floor where the police found him.

There was a .45 caliber handgun on the floor between the two bodies and a baseball bat next to Dethlefsen's body. Dethlefsen's head rested next to a gun cabinet and the glass face of the cabinet, which had a shotgun in it, had been broken. Police found a boot print that matched Benn's boot on a piece of broken glass next to Dethlefsen's elbow. There was also blood on one of Benn's boots with spatter patterns consistent with Benn's having shot Nelson in the head while standing next to his body.

Benn was charged with two counts of premeditated murder with the aggravating circumstance that the murders were part of a common scheme or single act, and was given notice of the government's intention to seek the death penalty. The defense conceded at trial that Benn had shot both Dethlefsen and Nelson, but claimed that the shootings were in self-defense after a spontaneous argument between Benn and Dethlefsen. The prosecution, however, contended that Benn had planned the killings primarily in order to cover up his participation with the victims in an arson-insurance-fraud scheme. At trial, the prosecution relied heavily on various inculpatory statements that Benn had allegedly made to Roy Patrick, a "jailhouse informant" who was in Benn's cell block while Benn was awaiting trial, as well as on highly circumstantial evidence relating to the alleged arson.

A. ADDITIONAL EVIDENCE AT TRIAL

On the day of the shootings, Benn had been at Larry Kilen's barbershop before he went to Dethlefsen's house. While at the barbershop, Benn spoke to Dethlefsen on the phone and Kilen heard him say "What the hell is going on? I will be right back -- I will be right there. What's the matter?

What is that?" Benn told Kilen that Dethlefsen was drunk and wanted him to come over because he had fallen down. Multiple witnesses at trial testified that Dethlefsen was an alcoholic, and his autopsy revealed that he had a blood alcohol content of 0.07 at the time of his death. Similarly, Nelson's autopsy revealed that he had a blood alcohol content of 0.11.

Benn denied that he went to Dethlefsen's house with the intention of harming either Dethlefsen or Nelson. A police search of Benn's car revealed that he had a .22 caliber pistol in the car that he had not taken inside the house with him. Benn did not testify at the trial and much of his version of the events was presented through statements he made to his brother, Monte Benn ("Monte").

Monte testified that Benn had described the following series of events to him: When Benn went into Dethlefsen's house on the day of the shootings, he found a piece of paper on the kitchen counter with Gail Fisk's phone number on it. Fisk was Benn's ex girlfriend with whom he had been trying to reconcile. Benn thought that Dethlefsen and Nelson were harassing Fisk because he had seen Nelson's car at Fisk's house on occasion. Benn had questioned Dethlefsen about Fisk previously but Dethlefsen had denied harassing her. After Benn discovered the note with Fisk's phone number on it, he took the note into the living room and confronted Dethlefsen. In response, Dethlefsen said, "Well Benny, you got me" and reached for the .45 caliber gun that he routinely kept on his living room coffee table. Benn then grabbed the gun and shot Dethlefsen in self-defense. After being shot, Dethlefsen moved toward the gun cabinet. Nelson then got up and threw a beer can at Benn. Benn remembered shooting Nelson, but did not remember much else.

Monte testified that he got the impression that the shooting was in self-defense. He also told the jury that Dethlefsen had a reputation for violence in the community. Other evidence presented at the trial corroborated parts of Benn's story. Experts testified that the path of the bullet that struck Dethlefsen's chest and then entered the back of the couch was consistent with Dethlefsen being in the act of rising from the couch at the time he was first shot. Moreover, Deputy James Jones testified that Dethlefsen probably broke the glass

face of the gun cabinet "as he fell . . . after being wounded" or while he was "trying to get a weapon." The defense theory was that Benn shot Dethlefsen a second time because Dethlefsen was trying to get another gun. During the investigation, the police also found an empty beer can underneath Nelson's right knee. This was consistent with Benn's claim that Nelson threw a beer can at him while he was standing next to the living room table near where the bodies were found.

Roy Patrick, a "jail house informant" who shared a cell with Benn when Benn was awaiting trial, testified on behalf of the prosecution. According to Patrick's testimony, Benn confessed to him and asked Patrick to help him find someone "on the outside" who would be willing to take the blame for the murders. Patrick testified that Benn drew diagrams of the murder scene and gave him details about the murder to relay to the person he found so that the person's statements would be believable.

The prosecution's theory was that the shootings were part of a common plan or scheme. Patrick's testimony provided critical support for that theory. Specifically, he testified that Benn told him about his involvement in a conspiracy with Dethlefsen and Nelson to perpetrate an insurance fraud. According to Patrick's testimony, Benn, Dethlefsen, and Nelson staged a "burglary" of Benn's trailer and collected the insurance. Then, a few months later, they burned down the trailer and collected insurance again. Both times, however, Benn refused to share the proceeds with Dethlefsen and Nelson. Nelson and Dethlefsen then threatened to disclose the crimes to the police, and Benn killed them to keep them from doing so.

Benn did in fact report a burglary of his trailer on October 12, 1987, but the only evidence of an insurance fraud with respect to that burglary (aside from Patrick's testimony) was the fact that Benn reported that ivory carvings were taken in the burglary and the police recovered some ivory figures from Dethlefsen's bedroom closet after he was killed. After the trial, however, a friend of the family stated that the half-brothers both owned ivory figures from Alaska.

Similarly, there was a fire at Benn's trailer on December 11, 1987, but there was little, if any, evidence, aside from Patrick's testimony, that the fire was intentionally started. There was testimony that Dethlefsen, an electrician, had worked on the furnace in Benn's trailer and that some possessions that Benn normally kept in the trailer were not there on the day of the fire. Additionally, Benn did tell Monte that he was nervous about fire insurance fraud charges being filed against him because he claimed more than he should have after the fire, but he never told Monte that he had started the fire. The prosecution emphasized that Benn sent in a payment for his home insurance on the day of the fire. According to the insurance agent, however, the payment was not late and it was to cover January and February insurance. Benn had already made payments to insure the trailer for December, the month of the fire.

The defense attempted to prevent the arson-insurance-fraud theory from being mentioned at trial by arguing in a motion in limine that there was no evidence of arson. In ruling that the information was admissible, the trial court said "This is probably the key decision in this case." The trial judge went on to state that:

> So far as the probative value is concerned, it goes to the very heart of the case. It is the kind of evidence that the State must and needs to prove if it's going to prove the aggravating factor that is involved in this case, and if it is going to prove premeditation. Without it, the State doesn't have a case for aggravated murder, or maybe doesn't have a case for pre-meditated murder. It is an essential ingredient.

In addition to testifying about Benn's burglary-arson-insurance-fraud motive, Patrick also testified that Benn wanted to kill Dethlefsen because Dethlefsen had removed Benn from his will and had given Benn's portion of his estate to a friend named William Hastings. Hastings testified that he was listed as a beneficiary in Dethlefsen's will, although there was nothing in the estate because Dethlefsen was so much in debt. Hastings did, however, get $40,000 from a separate life

insurance policy. Patrick did not say anything about a life insurance policy.

Finally, Patrick testified that Benn told him that he had tried to hire someone named "Pete" to kill Dethlefsen for $500 but then changed his mind. Benn told Patrick that he wanted whoever took the rap for the murders to kill Pete. The prosecution emphasized this point in closing arguments noting that Benn tried to "reach out" and kill someone from prison.

The defense sought to impeach Patrick on cross-examination by establishing that Patrick was in jail with Benn because he had pled guilty to and was awaiting sentencing for second-degree arson. There was a 6 to 12 month sentencing range for this offense and the prosecution had originally asked for a 9 month sentence. Based on Patrick's cooperation, he received 6 months rather than nine. With good time credits for his work in prison, however, Patrick would have needed to serve only an additional 35 days even if he had received the 9 month sentence originally sought by the prosecutors. Moreover, the prosecution downplayed the importance of the sentence reduction in closing arguments by stating "[t]he reward that he got was that in a 6 to 12 month sentence, he got six months instead of nine months. Big reward."

The defense also sought to impeach Patrick by eliciting testimony that Patrick had been ordered to pay costs and restitution for his arson conviction and had failed to do so; that he had previous convictions for fraud by wire, burglary, and arson; that he had been paid for his testimony as an informant; that the State was paying for his food and hotel expenses while he was testifying; and that the subpoena used to bring Patrick to the State of Washington for Benn's trial protected him from arrest or criminal process while he was in town.

During the trial, a third party told the defense that the police had executed a warrant to search Patrick's hotel room based on a tip that Patrick was dealing drugs from the room. His room had been searched and crack pipes, a bong, rolling paper, a razor blade, and a copper brillo pad were recovered, but no arrests were made. The prosecution knew about this search and failed to disclose information about it to the defense. The defense did not learn the name of the confidential

informant who had provided the information for the warrant until after the trial. At a later evidentiary hearing, the informant, Melvin Stevens, testified that Patrick was doing drugs while he was in Washington for Benn's trial. Stevens also said that Patrick told him that Benn did not commit the murder, but that Patrick knew enough to convict him and needed the money.[1]

Walter "Pete" Hartman testified on behalf of the prosecution and said that Benn offered to pay him to kill Dethlefsen. Hartman said that he initially thought it was just talk and that he never took Benn up on his offer.[2] Denver

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[1] As part of its factual findings following the post-conviction evidentiary hearing, the Pierce County Superior Court found that Stevens was not a credible witness.

Sherrie Woodard was one of the individuals who was with Patrick when his hotel room was searched. She testified at the state court evidentiary hearing that Patrick told her that he planted drugs in places in order to make busts when he was working as an informant and that Detective Padukiewicz, Patrick's supervisor, knew about it. She also said that Patrick would keep some of the drugs from the busts and that the detectives knew about this as well. When Woodard went to Patrick's hotel room during the Benn trial, she saw a large amount of money that Patrick said the police had given to him. Patrick also suggested to her that he was willing to lie to get out of trouble. She said Patrick's reputation for truthfulness was not very good.

Upon learning about the hotel room search during the trial, the defense moved for a continuance to have the opportunity to question Woodard and others involved in the hotel room search; however, the judge denied the motion.

[2] Benn directed his counsel at trial not to cross-examine Hartman "for fear that his family would be harmed." Benn told his lawyer that he was convinced that Hartman was threatening his family even though his family said there were no such threats. The defense called no witnesses until rebuttal because of these fears. During the trial, Benn's competency was re-evaluated three different times with conflicting expert opinions about whether he was or was not competent. Each time, the trial court ultimately deemed him competent and allowed the proceedings to continue. Benn learned during the post-conviction proceedings that he could have

Carter, a former roommate of Benn's, testified for the prosecution as well and said that Benn admitted to him that he had shot Dethlefsen and Nelson. At one point, Carter said that Benn told him that a man named "Pete" owed him a favor and that Benn had a job for him, but that Benn never mentioned what the job was. Benn told Carter that, when Benn called Dethlefsen's house on the day of the murder, no one was supposed to answer the phone, but Benn never explained what that meant.

After deliberating for approximately seven and a half hours, the jury returned a verdict of guilty on both counts of premeditated murder. The jury also found that the murders were part of a common scheme or plan but did not find that they were the result of a single act of the defendant. The jury then recommended that Benn be sentenced to death, and he was.

B. EVIDENCE REVEALED AFTER TRIAL

Although on December 16, 1988, over two years before the trial began, the defense requested that the prosecution disclose all evidence in its possession that was favorable to the defendant, a great deal of impeachment evidence relating to Patrick, as well as important exculpatory evidence relating to the alleged arson-insurance-fraud allegation, was not turned over to the defense until after both the guilt and penalty phases of the trial had ended.

(1) *Impeachment Evidence Related to Patrick*

Even though the prosecuting attorneys had taken their first statements from Patrick over a year before the trial, Patrick's identity was not disclosed to the defense until the day before trial when he was added to the witness list.[3] Pierce

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impeached Hartman with the witness's admitted intoxication and hearing difficulties at the time he spoke with Benn.

[3] Walter "Pete" Hartman and Denver Carter were also surprise witnesses who were not on the original witness lists. Both of these witnesses were "discovered" by the prosecution during the trial, well after opening statements had been delivered, and after the defense theory had been presented to the jury.

County Assistant Prosecuting Attorney Michael Johnson lied to the defense and stated that Patrick's identity could not be disclosed because he was in a witness protection program. It was later discovered that he was never in such a program.

The day that Benn's trial was scheduled to begin, the defense brought to the court's attention the fact that *Brady* material relating to Patrick had not been provided. The defense noted specifically that it did not have information about Patrick's prior contacts with the police, including whether Patrick had made statements in the past that had turned out to be incorrect. The trial court agreed and ordered the prosecution to turn over any written material relating to Patrick's contacts with law enforcement in the year prior to the murders. No such material was ever produced. The court also stated that "the prosecutor would have an obligation to tell [the defense] if there's prior situations where the informant had not been truthful." Prosecutor Johnson acknowledged this obligation and stated that they "ha[d] been notified of no such situations, your Honor." The prosecution never turned over any information that Patrick had engaged in improper conduct while acting as an informant. It was later discovered that the prosecution did not attempt to obtain this information from any of the police detectives working on the case. Additionally, the defense later discovered that Detectives Ronald Lewis and Thomas Padukiewicz, both of whom supervised Patrick while he was assisting in law enforcement investigations, knew that Patrick had stolen both drugs and money during drug busts and that he had lied to the police about it. The defense was never told about this. Detective Padukiewicz had even gone so far as to write up a "deactivation memo" stating that Patrick could no longer work as an informant because he would not abide by department rules. The defense was never told about Patrick's deactivation.

The defense was also not informed that Patrick had broken into the evidence room of the California Bureau of Narcotics Enforcement while working as an informant and had stolen drugs that the police had previously seized. Nor was the defense told that, as a result of this offense, Patrick was charged with burglary and numerous counts of obstruction of justice and ultimately pled guilty to burglary.

The state did not inform defense counsel that Patrick had admitted to making false charges while in prison on a fraud conviction in the early 1980's. Patrick had believed that he could get his time reduced if he reported the presence of firearms within the prison. He therefore had shotguns smuggled into the prison and then told the officials that he had found them. The prison officials discovered the scheme, and Patrick's prison sentence was extended.

The prosecution failed to disclose that Patrick was given $150 during Benn's trial as an advance payment for a video-tape that Patrick claimed he had in his possession, showing a prostitute being murdered by Benn and several other men. Patrick said that the video was related to the "Green River case," a high profile serial murder investigation. Patrick never produced the tape, and the detectives working on the case said that they thought Patrick was lying about its existence, and that his story about Benn being involved in the "Green River" murders was "trash." The detectives also stated that they had spoken with the prosecutors in Benn's case about the tape and the money that was paid to Patrick. The prosecution, however, never told the defense about either the false tale of a "Green River" murder tape or the payment that Patrick had received.

When Patrick was in Washington for Benn's trial, he was stopped for a traffic offense and arrested because of some outstanding warrants. He called Prosecutor Johnson from jail, and Johnson ensured that he was released without being charged. The defense was never told about the arrest or Johnson's actions.

During the trial, the Fife County Police Department submitted police reports to the Pierce County prosecutor requesting that Patrick be charged with burglary. The prosecutor's office entered an "NCF" (no charges filed) the same day that closing arguments ended in the penalty phase of Benn's trial. This fact was never disclosed to the defense. During Benn's trial, the prosecution arranged to postpone the filing of a warrant that was going to be issued because Patrick had violated probation. Patrick's probation officer had been told by the prosecutors not to do anything on the violation report or the order to issue a bench warrant. The warrant did not issue until two weeks after the verdict in Benn's case. The

prosecution never told the defense that it had prevented the issuance of the warrant.

Testimony at the state habeas evidentiary hearing revealed that Patrick had acted as an informant in a murder case prior to Benn's trial, although at the trial he denied ever having done so previously. The defense was never told that Patrick had been an informant in a prior murder case and that in that case also he had claimed that the defendant had confessed to him while in jail.

At trial, Patrick denied that he used drugs while acting as an informant; however, testimony at a post-conviction evidentiary hearing revealed that he continuously used drugs during his time as an informant and that the police knew about it. This information was not disclosed to the defense.

(2) *Exculpatory Evidence Related to the Arson-Insurance-Fraud Allegation*

The prosecution turned over two reports describing the December 11, 1987 fire at Benn's trailer. The first was a February 12, 1988 report tentatively concluding that the fire was an accident. After this report was prepared, Deputy Fire Marshal Ted Thompson and Electrical Inspector Walter Erickson conducted a more thorough re-examination of the site. After the re-examination, Thompson and Erickson both conclusively determined that the fire in Benn's trailer was accidental. According to Erickson, the Coleman furnace in Benn's trailer was the same make and model as the one that he owned, and this particular make and model had been recalled by the manufacturer due to a flaw that causes fires. Moreover, Fire Marshal Thompson concluded that the fire was accidental because:

> First, it is not uncommon for electrical heaters in older mobile homes to accidentally malfunction and cause fires. Second, there were no accelerants, such as gasoline in the trailer. Third, it is not uncommon for electrical heaters to malfunction in the winter . . . . Fourth, I opened up the front of the electrical heater and everything appeared to be in place; I observed

> nothing suspicious . . . . My fifth reason for determining the fire was accidental, not arson, was that I observed only one locale where the fire originated (the furnace), not multiple locales. Sixth, I saw no signs of forced entry, which are indicative of arson.

After the re-examination, a second and more detailed report was prepared on March 30, 1988. The second report, which was turned over to the defense, was misleading. Its only reference to the conclusions of Fire Marshal Thompson and Electrical Inspector Erickson was in a section stating that there was "no fault or failure" of the lead electrical wire and no evidence of tampering with the fuse panel. The March 30, 1988 report did not state that both the fire inspector and deputy marshal had concluded that the fire was accidental and could not have resulted from arson. Rather, it offered no definitive conclusion regarding the cause of the fire. It did not state that there had been a manufacturer's recall of this type of furnace and that it was the same type of furnace that Erickson had in his own home. To the contrary, it suggested that Coleman furnaces did not cause fires. Specifically, the March report stated that Al Pearson, the furnace technician, said that "he could find and think of no situation in which a furnace [such as a Coleman] had caused a fire in a mobile home". Finally, the report did not relate the six reasons Fire Marshal Thompson gave for concluding that the fire was accidental.

II. PROCEDURAL HISTORY

Benn appealed his convictions as well as his capital sentence. His direct appeals were denied by the Washington Supreme Court in *Washington v. Benn*, 845 P.2d 289 (Wash. 1993), with three justices dissenting. Benn then initiated state habeas corpus proceedings and an evidentiary hearing was held. The Washington Supreme Court denied the state habeas petition. *In re Benn*, 952 P.2d 116 (Wash. 1998). It did not deny that the state improperly withheld evidence to which Benn was entitled, but it found that the state's actions were not prejudicial. *See id.* Two justices dissented, arguing that Benn should have received a new trial because of the state's failure to turn over exculpatory and impeachment material. *Id.*

Benn filed a federal habeas petition in the Western District of Washington alleging 22 errors, including his allegation that the prosecution withheld crucial exculpatory and impeachment evidence in violation of his due process rights. The district court agreed with Benn that material evidence had been withheld in violation of his constitutional rights, granted his petition for a writ of habeas corpus, and ordered a new trial without even considering the 21 other grounds of error asserted in his petition. *Benn v. Wood*, No. C98-5131RDB, 2000 WL 1031361 (W.D. Wash. June 30, 2000). The state now appeals the district court's decision. We affirm the district court.

III. STANDARD OF REVIEW

[1] We review a district court's decision to grant a petitionfor a writ of habeas corpus *de novo*. *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999). Because Benn's petition was filed after April 24, 1996, the amendments to 28 U.S.C. § 2254 under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") apply. *Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (9th Cir. 2000).[4]

[2] Under AEDPA, a federal court may grant a writ of habeas corpus to a state prisoner only if the state court's

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[4] In arguing that the district court should be reversed, the state asserts that the district court failed to state explicitly in its opinion how the state court decision was contrary to federal law and that this failure shows that the district court did not apply the AEDPA standard. The state is wrong for two reasons. First, the district court carefully described the AEDPA standard in a full paragraph at the beginning of its opinion and stated that Benn was not entitled to relief unless that standard was satisfied. *Benn v. Wood*, No. C98-5131RDB, 2000 WL 1031361, at *2 (W.D. Wash. June 30, 2000). After expressing his reluctance to overturn a Washington Supreme Court decision, Judge Burgess granted Benn habeas relief because the prosecution withheld material evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and because the importance and sheer amount of withheld evidence "seriously" undermined confidence in the verdict. *Benn*, 2000 WL 1031361, at *2. Thus, it appears that the district court did apply the AEDPA standard. Second, our review of the district court's decision is *de novo*. *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999). Thus, any error in applying the AEDPA standard would be of no consequence on this appeal.

decision is "contrary to, or involve[s] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or is "based on an unreasonable determination of the facts in light of the evidence presented" in the state courts. 28 U.S.C. § 2254(d). A state court decision is "contrary to" clearly established federal law if it "failed to apply the correct controlling authority from the Supreme Court." *Shackleford v. Hubbard*, 234 F.3d 1072, 1077 (9th Cir. 2000); *see also Williams v. Taylor*, 529 U.S. 362, 405-07 (2000); *Packer v. Hill*, No. 00-57051, 2002 WL 47063 (9th Cir. Jan. 15, 2002).[5] A state court decision constitutes an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal rule . . . but unreasonably applies it to the facts of the particular state prisoner's case." *Williams* , 529 U.S. at 407.[6]

[3] In *In re Benn*,[7] the Washington Supreme Court applied the rule in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny[8] -- a rule clearly established by controlling

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[5] The addition, deletion, or alteration of a factor in a test established by the Supreme Court also constitutes a failure to apply controlling Supreme Court law under the "contrary to" clause of AEDPA. *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); *Brown v. Mayle*, No. 99-17261, _____ F.3d _____ [will be filed within the week].

[6] In both "contrary to" and "unreasonable application" cases, the erroneous state court ruling must also satisfy *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (requiring that the error have had a substantial or injurious effect on the verdict). *See Packer*, 2002 WL 47063, at *7. Where, as here, however, the alleged error is a Brady violation, the petitioner need show only that the state court's *Brady* ruling was erroneous under AEDPA, because a *Brady* error a *fortiori* satisfies *Brecht*. *See Kyles v.Whitley*, 514 U.S. 419, 436 (1995) ("[O]nce there has been *Bagley* error . . . it cannot subsequently be found harmless under *Brecht*."); *Bagley*, 473 U.S. at 678 (holding that, in order to establish a *Brady* violation, a petitioner must show prejudice).

[7] We look to the Washington Supreme Court's state habeas decision because, when conducting an AEDPA analysis, we examine the state court's last reasoned decision. *See Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000).

[8] The state court cited to and appears to have applied (albeit clearly erroneously) *United States v. Bagley*, 473 U.S. 667, 676 (1985), and *United States v. Agurs*, 427 U.S. 97, 110 (1976), in addition to *Brady*.

Supreme Court precedent. Therefore, the state court ruling is properly analyzed under the "unreasonable application" clause of AEDPA. To be "unreasonable" under AEDPA, the Washington Supreme Court decision must leave us "with a 'firm conviction' that one answer, the one rejected by the [state] court, was correct and the other, the application of the federal law that the [state] court adopted, was erroneous -- in other words that clear error occurred." *Van Tran*, 212 F.3d at 1153-54. When analyzing the state court decision to determine if there was "clear error," "we must first consider whether the state court erred; only after we have made that determination may we then consider whether any error involve[s] an unreasonable application of controlling law . . . ." *Van Tran*, 212 F.3d at 1155. Here, we conclude that the Washington Supreme Court erred in ruling that the prosecution's failure to disclose critical impeachment and exculpatory evidence did not violate *Brady* and its progeny. Because we also hold that the state court's ruling was clearly erroneous and thus objectively unreasonable under AEDPA, Benn is entitled to habeas relief.

IV. THE WASHINGTON SUPREME COURT'S OBJECTIVELY UNREASONABLE *BRADY* ERRORS

A. INTRODUCTION

[4] In *Brady*, the Supreme Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Supreme Court cases following *Brady* clearly established that the defendant must prove three elements in order to show a *Brady* violation. First, the evidence at issue must be favorable to the accused, because it is either exculpatory or impeachment material. *See United States v. Bagley*, 473 U.S. 667, 676 (1985). Second, the evidence must have been suppressed by the State, either willfully or inadvertently. *See United States v. Agurs*, 427 U.S. 97, 110 (1976). Third, prejudice must result from the failure to disclose the evidence. *See Bagley*, 473 U.S. at 678.

[5] Evidence is deemed prejudicial, or material, only if it undermines confidence in the outcome of the trial. *See Bagley*, 473 U.S. at 676; *Agurs*, 427 U.S. at 111-12.[9] For purposes of determining prejudice, the withheld evidence must be analyzed "in the context of the entire record." *Agurs*, 427 U.S. at 112. Moreover, we analyze all of the suppressed evidence together, using the same type of analysis that we employ to determine prejudice in ineffective assistance of counsel cases. *See Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.);[10] *see also United States v. Shaffer*, 789 F.2d 682, 688-68 (9th Cir. 1986) (analyzing collectively the prejudice resulting from the state's suppression of four different pieces of impeachment material).

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[6] The Supreme Court has not limited the *Brady* rule to cases in which the defense has made a pretrial request for specific evidence. *See Agurs*, 427 U.S. at 103-07. In *Agurs*, the Court held that *Brady* applies where the defense makes a general request for exculpatory evidence and even where the defense does not make a request for such evidence at all. *See id.* at 106. Thus, the terms "suppression," "withholding," and

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[9] The Supreme Court refers to the requirement that the defense establish that the suppressed evidence was prejudicial to the outcome as a "materiality" requirement and/or a "prejudice" requirement. *See Brady*, 373 U.S. at 87 (requiring that the suppressed evidence be "material" to guilt or punishment); *id.* at 88 (referring to the state's suppression of a confession as "prejudicial" to the defendant). The terms "material" and prejudicial" are used interchangeably in *Brady* cases. Evidence is not "material" unless it is "prejudicial," and not "prejudicial" unless it is "material." Thus, for Brady purposes, the two terms have come to have the same meaning.

[10] Justice Blackmun's comparison of the prejudice inquiry under *Brady* to that under *Strickland v. Washington*, 466 U.S. 668 (1984), was joined by Justice O'Connor. Justices Brennan and Marshall dissented arguing for an even stricter standard of materiality that would have required reversal in all cases in which the prosecution suppressed exculpatory or impeachment evidence unless it was clear beyond a reasonable doubt that the withheld evidence would not have affected the outcome. *See id.* at 704 (Marshall, J., dissenting). Justice Stevens would have applied different standards of materiality depending on whether the defendant made a request for *Brady* information or not. *See id.* at 711 (Stevens, J., dissenting). In a case such as Benn's, in which the defense did make a *Brady* request, Justice Stevens would have applied a stricter materiality standard as well. *See id.*

"failure to disclose" have the same meaning for Brady purposes. Similarly, the disclosure requirements set forth in *Brady* apply to a prosecutor even when the knowledge of the exculpatory evidence is in the hands of another prosecutor. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) ("The prosecutor's office is an entity and as such it is the spokesman for the Government.").

Here, the state does not contest that it was required to disclose the extensive impeachment evidence pertaining to Patrick. It simply contends, as did the Washington Supreme Court, that the failure to produce that evidence did not result in prejudice under *Brady*. We conclude that the state court erred in that determination. Similarly, we conclude that it erred in holding that there was no *Brady* violation resulting from the prosecution's failure to disclose exculpatory evidence about the cause of the fire at Benn's trailer. Because we conclude that the suppressed impeachment evidence and the suppressed exculpatory evidence are each, standing alone, sufficiently prejudicial to merit relief under *Brady*, they are *a fortiori* sufficiently prejudicial when analyzed together. We therefore hold that the state court erred when conducting its *Brady* analysis. We also hold that the state court ruling was clearly erroneous and constitutes an "unreasonable application" of *Brady* and its progeny. Therefore, Benn is entitled to habeas relief.

B. THE PROSECUTION'S FAILURE TO DISCLOSE CRITICAL IMPEACHMENT EVIDENCE THAT COULD HAVE BEEN USED TO UNDERMINE PATRICK'S CREDIBILITY IS SUFFICIENT, STANDING ALONE, TO CONSTITUTE A *BRADY* VIOLATION.

The prosecution failed to disclose multiple pieces of critical impeachment information that could have been used to undermine the credibility of Patrick, a prosecution witness whose testimony was crucial to the state's claims of premeditation and common scheme or plan, as well as to the state's theory regarding Benn's principal motive for killing the two individuals. Because Patrick is a witness whose "'reliability . . . may well be determinative of guilt or innocence,' nondisclosure of evidence affecting [his]

credibility falls within [the *Brady*] rule." *Giglio*, 405 U.S. at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)); *see also Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997) ("Material evidence required to be disclosed includes evidence bearing on the credibility of government witnesses."); *Shaffer*, 789 F.2d at 689 ("[E]vidence affecting the credibility of a government witness has been held to be material under the Brady doctrine.").

(1) *Patrick's history of misconduct while acting as an informant*

The prosecution failed to disclose evidence of Patrick's persistent misconduct while acting as an informant, even though the trial judge explicitly ordered the state to disclose all such information to the defense. Specifically, the state failed to disclose: that Patrick, while acting as an informant, had stolen both drugs and money during drug busts and had lied to police about it; that a detective had written a deactivation memo stating that Patrick could no longer work as an informant because he could not be trusted to follow departmental rules; that Patrick, while acting as an informant, had broken into an evidence room and stolen drugs, resulting in burglary and obstruction of justice charges being filed against him; that Patrick had smuggled guns into a prison where he was housed, concealed his own involvement, and then told prison officials of the presence of the weapons in an effort to have his sentence reduced; and that although Patrick testified at trial that he did not ever use drugs, he continually did so during his time as an informant.

The state does not contest that this evidence was impeachment material that was suppressed by the prosecution. Rather, it contends that the suppressed material was cumulative and its suppression harmless because Patrick was sufficiently impeached by questions about his history as a paid informant in drug cases, his prior convictions, the reduction in his arson sentence, and the fact that the state was paying his motel and food bills. *See United States v. Vgeri* 51 F.3d 876, 880 (9th Cir. 1995) (undisclosed impeachment evidence is immaterial and cumulative when the witness is already sufficiently impeached); *see also Ortiz v. Stewart*, 149 F.3d 923, 936 (9th Cir. 1998) (same).

[7] The undisclosed impeachment evidence in this case was substantial and was far more damaging to Patrick's credibility than the impeachment evidence available to the defense at trial. If anything, the police-sanitized version of Patrick's fifteen years of work as an informant increased his credibility in the eyes of the jurors. The jury was told only that the police routinely relied on Patrick for help with drug investigations. Information demonstrating that Patrick had regularly lied to the authorities while acting as an informant, was untrustworthy and deceptive, and was even willing to fabricate crimes in order to gain a benefit for himself would have severely undermined his credibility. The mere fact that a prosecution witness has a prior record, even when combined with other impeachment evidence that a defendant introduces, does not render otherwise critical impeachment evidence cumulative. *See, e.g., United States v. Steinberg*, 99 F.3d 1486, 1489-92 (9th Cir. 1996) (holding that the government's failure to disclose that an informant had been involved in two illegal transactions involving counterfeit currency was material even though the informant had been impeached through questioning about a plea agreement that he had made with the government). In cases in which the witness is central to the prosecution's case, the defendant's conviction indicates that in all likelihood the impeachment evidence introduced at trial was insufficient to persuade a jury that the witness lacked credibility. Therefore, the suppressed impeachment evidence, assuming it meets the test for disclosure, takes on an even greater importance.

[8] For example, in *Carriger v. Stewart*, 132 F.3d at 479, we held that information that an informant had been unreliable in the past constituted material impeachment evidence for *Brady* purposes. Like Patrick, the informant in *Carriger* came to the police with an offer of information and received a benefit for providing the information. *Id.* at 465. We stated that "[w]hen the state decides to rely on the testimony of such a witness, it is the state's obligation to turn over all information bearing on that witness's credibility." *Id.* at 480. As we said, "[t]his must include the witness's criminal record, including prison records, and any information therein which bears on credibility." *Id.* Like Patrick, the informant in *Carriger* was impeached at trial with evidence of prior

convictions. In fact, the defense's impeachment of the informant in *Carriger* was more extensive than Benn's impeachment of Patrick. At Carriger's trial, it was shown that the informant was a career burglar with six previous felonies, *see id.* at 480, whereas here, Patrick was impeached with only three previous convictions.

[9] In holding that the suppressed evidence was material in *Carriger*, we stated that:

> The district court erred when it concluded that Carriger had not been prejudiced by the withholding of the information because the jury already knew [that the informant] was a burglar testifying with immunity. The telling evidence that remained undisclosed included the length of [the informant's] record . . . and, more important, his long history of lying to the police.

Id. at 481. Here, the defense was not informed of Patrick's burglary and obstruction of justice charges, his fraudulent attempt to smuggle guns into a prison, or his multiple thefts of drugs and money; nor was it informed of the fact that Patrick provided false information to law enforcement. As a result, the jury was not told about Patrick's record of criminal misconduct while acting as an informant, nor that he had repeatedly lied to the police.

The present case is also similar to *United States v. Brumel-Alvarez*, 991 F.2d 1452 (9th Cir. 1992), in which the government's principal witness was a police informant who had been involved in illegal drug operations for twenty-five years. The government withheld a memorandum that detailed false claims that the police informant had made to government agents. *Id.* at 1459. We stated that the informant's credibility "was an important issue in the case" and that "[e]vidence that he lied during the investigation . . . would be relevant to his credibility and the jury was entitled to know of it." *Id.* at 1463; *see also United States v. Bernal-Obeso*, 989 F.2d 331, 335 (9th Cir. 1993) ("[A] lie to the authorities paying for [an informant's] services . . . would be relevant evidence as to the informant's credibility.").

[10] Evidence that Patrick continually used drugs while acting as an informant and that the police knew about this but chose not to prosecute him would also be relevant to show his bias. If Patrick was continually receiving a benefit from the prosecution -- the ability to use drugs without fear of criminal repercussions -- that would have given him a motive to provide the prosecution with inculpatory information, even if he had to fabricate it.

[11] Finally, evidence that Patrick was using drugs during the trial would reflect on his competence and credibility as a witness. There was no evidence at trial to impeach Patrick's competence or his ability to recollect or perceive the events. Thus, evidence of his drug use would have provided the defense with a new and different ground of impeachment.

[12] Were there no other pieces of withheld evidence in this case, we would hold that the suppression of impeachment evidence about Patrick's criminal misconduct and repeated lies to the police, while acting as an informant, is, standing alone, sufficiently prejudicial to establish a *Brady* violation. The fact that other impeachment evidence was introduced by the defense does not affect our conclusion. Where, as here, there is reason to believe that the jury relied on a witness's testimony to reach its verdict despite the introduction of impeachment evidence at trial, and there is a reasonable probability that the suppressed impeachment evidence, when considered together with the disclosed impeachment evidence, would have affected the jury's assessment of the witness's credibility, the suppressed impeachment evidence is prejudicial. We need not further address the prejudice issue at this point, however, given our holding that the withheld impeachment evidence, when analyzed collectively, materially undermines our confidence in the verdict. *See* discussion of prejudice *infra* Section IV.B.5.

(2) *Patrick's false allegation about Benn*

[13] There is one specific lie of Patrick's that, standing alone, would be sufficient to constitute a *Brady* violation. The prosecution failed to disclose that Patrick approached the police a week before trial claiming that he had a videotape showing that Benn was involved in a killing that was part of a

notorious unsolved murder case (the Green River murders) unrelated to the Dethlefsen-Nelson killings. The prosecution also failed to disclose that Patrick was given $150 to produce the tape, that he never did so, and that the detectives concluded that he was lying about the tape's existence and about Benn's involvement in the other murders. This evidence could have been used to show that Patrick was willing to lie *about Benn* and even to accuse him falsely of *murder*, if doing so would result in even a minimal benefit to him. In *Bernal-Obeso*, 989 F.2d at 336, we described the difference between general evidence of untrustworthiness and specific evidence that a witness has lied as follows: "All the other evidence used by the defense to punch holes in [the informant's] credibility amounted only to circumstantial reasons why [the informant] might alter the truth to continue to feather his own nest. A lie would be direct proof of this concern, eliminating the need for inferences."

[14] The evidence regarding the non-existent videotape would have seriously impeached Patrick in a way that the evidence presented at trial could not, and even that the evidence of other lies could not. It provided direct proof that Patrick was willing to lie specifically about Benn's involvement in a murder and to accuse him falsely of a capital offense. Patrick, when confronted with his lies at the state habeas evidentiary hearing, confessed that "I would lie -- I would always lie about me. I would always do that. I was a liar." The jury, however, never heard that Patrick had lied about anything. The evidence regarding Patrick's tale of the videotape was "direct proof" of his lack of credibility, and the failure to disclose his fabrication was prejudicial.

(3) *Patrick's exposure to prosecution*

The *Brady* rule requires prosecutors to disclose any benefits that are given to a government informant, including any lenient treatment. *See, e.g., Giglio*, 405 U.S. at 150 (failure to disclose promise of immunity). During Benn's trial, Patrick was stopped for a traffic offense and arrested because he had outstanding warrants. He called the prosecutor from jail and the prosecutor arranged for him to be released without being charged. This benefit was never disclosed to the defense. Also during Benn's trial, the Fife police department asked the

prosecution to charge Patrick with burglary, but the prosecutor's office dismissed the charges. Once again, this information was withheld from the defense. The prosecution also arranged to postpone the filing of a warrant that was supposed to issue because Patrick had violated his probation. The warrant was delayed for two weeks -- until after the Benn trial ended. The government failed to inform defense counsel about this benefit as well.

We have explained the reason why information regarding prosecution-provided benefits constitutes *Brady* material. In *Singh v. Prunty*, 142 F.3d 1157 (9th Cir. 1998), we stated:

> Disclosure of an agreement to provide such benefits, as well as evidence of the benefits themselves, could have allowed the jury to reasonably conclude that [the informant] had a motive other than altruism for testifying on behalf of the State. Such a finding could have substantially impeached [the informant's] credibility as a witness.

Id. at 1162. Here, too, a jury could have reasonably concluded that Patrick had "a motive other than altruism."

The state contends that the information regarding benefits was cumulative and immaterial because the defense cross-examined Patrick about his immunity from arrest during the trial and about the reduced sentence he received in exchange for his testimony. The reduced sentence that Patrick received did not provide any significant benefit to him. With good time credits for his work in prison, Patrick would have served only an additional 35 days had he received the longer sentence originally sought by the prosecutors. In addition, the state effectively downplayed the importance of this benefit in closing arguments by stating, "[t]he reward that he got was that in a 6 to 12 month sentence, he got six months instead of nine months. Big reward."

Moreover, as we pointed out earlier, the state cannot satisfy its *Brady* obligation to disclose exculpatory and impeachment evidence "by making some evidence available

and asserting that the rest would be cumulative. Rather, the state is obligated to disclose 'all material information casting a shadow on a government witness's credibility.' " *Carriger*, 132 F.3d at 481-82 (internal citations omitted). Here, the number and nature of the undisclosed benefits was such that they would have impeached Patrick more effectively than the evidence that he was immune from arrest during the trial. The undisclosed benefits that Patrick received added significantly to the benefits that were disclosed and certainly would have "cast a shadow" on Patrick's credibility. Thus, their suppression was material.

(4) *Patrick's experience as an informant*

At trial, Patrick denied that he had ever previously been an informant in a murder case, but in fact he had. The state argues that this undisclosed evidence about Patrick's history was not material; however, in *Shaffer*, 789 F.2d at 689, we stated that undisclosed evidence that an informant had previously participated in a heroin investigation was important impeachment evidence that could have been used to discredit the informant's trial testimony that he had not previously participated in that type of investigation. The circumstances in *Benn* are identical.

(5) *Prejudice Resulting from the Suppression of the Impeachment Evidence, Considered Collectively*

In determining whether the suppression of impeachment evidence is sufficiently prejudicial to rise to the level of a *Brady* violation, we analyze the totality of the undisclosed evidence "in the context of the entire record." *Agurs*, 427 U.S. at 112; *see also Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.).[11]

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[11] While the good faith or bad faith of the state is irrelevant when material impeachment evidence has been withheld from the defense, *see Brady*, 373 U.S. at 87, the Supreme Court applies a stricter standard of materiality -- a standard of materiality that is more favorable to the defendant -- when the prosecutor has knowingly relied on or condoned the use of perjured testimony, *see Bagley*, 473 U.S. at 680 ("[T]he fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt."); *Agurs*, 427 U.S. at 103

Because the withheld impeachment evidence would not simply have been cumulative of the impeachment evidence introduced at trial, but would have created substantial doubt as to Patrick's credibility, it is important to analyze the significance of Patrick's testimony to the prosecution's case. Patrick's testimony was critical because it directly contradicted Benn's evidence that he acted in self-defense and that he did not premeditate the killings. Moreover, it provided the only direct evidence of the aggravating factor of common scheme or

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(holding that, under this "stricter" standard of materiality, a conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury"); *see also United States v. Endicott*, 869 F.2d 452, 455 (9th Cir. 1989) ("[I]f the prosecution knowingly uses perjured testimony, or if the prosecution knowingly fails to disclose that testimony used to convict a defendant was false, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury verdict."). The Court explained that a stricter standard of materiality is necessary in these cases because they involve "prosecutorial misconduct and, more importantly. . . . 'a corruption of the truth-seeking function of the trial process.' " *Bagley*, 473 U.S. at 680 (quoting *Agurs*, 427 U.S. at 104); *see also Bernal-Obeso*, 989 F.2d at 337.

Here, there is evidence that the state lied to defense counsel when it "falsely claim[ed]" that Patrick was in a witness protection program. There is also evidence that the state knowingly allowed Patrick to commit perjury when it stood by and said nothing while Patrick perjured himself by stating that he did not use drugs while acting as an informant. Similarly, the prosecution said nothing when Patrick lied at trial about never having previously served as an informant in a murder case. There is also evidence of other prosecutorial misconduct that corrupted the truth-seeking function of the trial. For example, the prosecution blatantly violated state discovery rules by failing to disclose Patrick's identity to the defense until the day before trial, even though the prosecution had recorded his statement over a year earlier; the prosecution did not even attempt to obtain information about Patrick's informant history despite a court order to do so; and the detective who prepared the March 30, 1988 report "selectively omit[ted]" information that the fire was accidental. *See* discussion *supra* Section I.B.2. Consequently, a stricter standard of materiality applies to the *Brady* analysis. It is, however, unnecessary to apply that standard in this case because the prejudice resulting from the suppression of the impeachment evidence here was so great that it would satisfy any rational standard of materiality.

plan. Patrick was the only witness to testify to the state's primary theory that Benn killed Dethlefsen and Nelson for threatening to reveal an arson-insurance-fraud scheme. He was also the only witness to suggest that Benn wanted to kill Dethlefsen because Dethlefsen changed his will so as to remove Benn as a beneficiary. Without those theories (and it is difficult to believe that the jury would have accepted the will theory), the only motive the prosecution suggested was that Benn was upset because he thought that Dethlefsen was harassing his ex-girlfriend -- a motive that supported the defense's theory (that Benn became upset when he saw a note with his ex-girlfriend's phone number on it in Dethlefsen's house and a spontaneous argument ensued) as much as the prosecution's.

Moreover, Patrick's testimony that Benn attempted to hire someone to kill Hartman while in prison undercut Benn's defense, because the jury was more likely to believe that Benn was guilty of premeditating the murders of Dethlefsen and Nelson after being told that he plotted to kill Hartman from prison.

The state's failure to disclose to the defense that Patrick was a potential witness prior to the day before trial exacerbated the harm that resulted from its failure to provide impeachment information about him, because the defense did not have sufficient time to investigate Patrick and prepare for cross-examination.

The dissenting justices in the Washington Supreme Court's state habeas case stated that the withheld information concerning Patrick was so significant that a new trial was required. *See In re Benn*, 952 P.2d at 155-56. The district court agreed with the Washington Supreme Court's dissent that "[t]he significance of Patrick's testimony cannot be over-stated." *Benn v. Wood*, 2000 WL 1031361, at *5 (W.D. Wash. 2000). Both statements are correct.

[15] Analyzed collectively, the withheld impeachment evidence reveals that Patrick, a critical witness for the state, was "completely unreliable, a liar for hire, [and] ready to perjure himself for whatever advantage he could squeeze out of the system." *Id.* We hold that the suppression of the

impeachment evidence undermines confidence in the outcome of Benn's trial and was therefore prejudicial. We further hold that the Washington Supreme Court's decision to the contrary was clearly erroneous and constitutes an unreasonable application of clearly established Supreme Court law.

C. THE PROSECUTION'S FAILURE TO DISCLOSE EXCULPATORY EVIDENCE THAT THE FIRE AT BENN'S TRAILER WAS ACCIDENTAL AND NOT THE RESULT OF ARSON IS SUFFICIENT, STANDING ALONE, TO CONSTITUTE A *BRADY* VIOLATION.

The prosecution failed to disclose that Deputy Fire Marshal Ted Thompson and Electrical Inspector Walter Erickson both conclusively determined that the fire in Benn's trailer was accidental. The state did disclose its March 30, 1988 report stating on the basis of these experts' investigation that there was "no fault or failure" of the lead electrical wire and no evidence of tampering with the fuse panel. The report did not state that the deputy fire marshal and electrical inspector had concluded that arson was *not* the cause of the trailer fire; that the furnace was the same type that Erickson had in his own home; or that there had been a manufacturer's recall of this type of furnace because it tended to cause fires. Rather, the report suggested that Coleman furnaces did not cause fires.

The experts' conclusion that the fire was accidental, and the reasons therefor, was material evidence that could have served to rebut the arson-insurance-fraud theory that the prosecution offered to prove motive, premeditation, and the aggravating circumstance of common scheme or plan. We reject the Washington Supreme Court's conclusion that the cause of the fire was not critical to the prosecution's insurance fraud theory because, as the state trial court stated, the arson-insurance-fraud theory evidence was "the kind of evidence that the State must and needs to prove if it's going to prove the aggravating factor that is involved in this case . . . . Without it, the State doesn't have a case for aggravated murder. . . ." The district court reiterated this point when it stated that evidence of the accidental nature of the fire, if presented to the jury, would have "gravely undercut[ ] the fear of police exposure" that the prosecution asserted led Benn to kill Dethlefsen and

Nelson. *Benn v. Wood*, 2001 WL 1031361, *3 (W.D. Wash. 2000).[12] The prosecutor also stressed the importance of the arson-fraud-insurance theory to the jury. In his closing argument, he stated: "And aggravating circumstances exist . . . the common scheme or plan, the single act . . . . [H]e indeed wanted both men dead. He told the persons he confided in about the fact that Mike was threatening over the fire insurance money as well as Jack."[13]

The state argues that its failure to disclose this exculpatory information did not constitute a *Brady* violation because Benn was aware of the February 12, 1988 report in which the deputy fire marshal tentatively concluded that the fire was accidental. The February report's tentative conclusion, however, was displaced by the conclusions in the later March 30, 1988 report. The March report suggested that, after further investigation, the experts had reached a different conclusion. Specifically, the report stated that Al Pearson, a furnace technician, said that "he could find and think of no situation in which a furnace [such as a Coleman] had caused a fire in a mobile home."

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[12] The state points out that Benn did tell his brother, Monte, that he was nervous about fire insurance fraud charges being filed against him because he claimed a greater financial loss than he incurred. However, as the district court observed, a threat to tell the police that a person claimed more than he should have after a fire is materially different from a threat to tell the police that the person conspired to commit an arson, played a role in starting the fire, and then claimed an excessive loss following the fire. *See Benn v. Wood*, 2001 WL 1031361, at *3 (W.D. Wash. 2000).

[13] At oral argument, the state contended that the mere fact that Benn shot both Dethlefsen and Nelson was sufficient to show a common scheme or plan and that the arson-insurance-fraud theory was, therefore, unnecessary. In order to prove a "common scheme or plan" under Washington state law, however, "there must be a nexus between the killings" that goes beyond the mere firing of the fatal shots. *Washington v. Finch*, 975 P.2d 967, 994 (Wash. 1999). Specifically, "[t]he term [common plan or scheme] refers to a larger criminal design, of which the charged crime is only part. To prove the existence of this aggravator the killings must be connected by a larger criminal plan. Thus, the 'nexus' exists when an overarching criminal plan connects both murders." *Id.* The arson-insurance-fraud scheme was what the state relied on to prove "an overarching criminal plan."

The state, relying on *United States v. Marashi*, 913 F.2d 724 (9th Cir. 1990), and *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991), asserts that there was no *Brady* violation because Benn could have discovered the experts' conclusions by interviewing them. *Marashi* does not support the state's position. There, we simply held that the prosecution's failure to disclose an IRS agent's notes revealing the identity of a private detective was not prejudicial to the defense because the defendant's own conduct showed that the evidence was not material. We relied in part on the fact that the defendant had access to and chose not to interview the individual who hired the private detective as support for that holding. *Marashi*, 913 F.2d at 733-34. Here, contrary to *Marashi*, there is no doubt of the materiality of the suppressed evidence.

Aichele involved the obligation of a United States Attorney to turn over California State Department of Corrections files that were under the exclusive control of California officials. We held that because the United States Attorney had no control over the state's files there was no *Brady* violation. *See also United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995) (holding that the federal government did have an obligation to turn over information in the possession of the Bureau of Prisons and limiting the principle in *Aichele* to federal prosecutions in which material is held exclusively by a *state* agency). The *Aichele* court then added, by way of dictum, that if a defendant can ascertain the material on his own, there is no suppression. Certainly, that observation is over-broad, at the very least. We need not consider, however, whether the dictum in *Aichele* accurately states the law, particularly after *Kyles v. Whitley*, 514 U.S. 419 (1995), or what the limitations on that dictum might be. For whatever its merit, and we express no view, the *Aichele* dictum would not apply in circumstances such as those present here.

In *Paradis v. Arave*, 130 F.3d 385 (9th Cir. 1997), a post-*Aichele* case, our *Brady* analysis was not affected by the defendant's knowledge of and ability to interview the prosecution's expert and obtain the undisclosed material. There, the medical expert testified at trial that the victim was killed in a creek where her body was found. That testimony contradicted the defense theory that the victim was killed by

others at Paradis' house when Paradis was not home and that Paradis then just helped dump the body in the creek. After the trial, defense counsel discovered that the prosecutor had written notes of the briefing conducted by the medical expert shortly after he performed the autopsy. The written notes showed that at that time the medical expert had expressed the opinion that the victim did *not* die in the creek. The prosecution did not disclose this fact. We held that the undisclosed material constituted impeachment evidence, although the defendant obviously knew of the expert's existence and could have obtained the suppressed information from him. *Paradis*, 130 F.3d at 392.

The facts in *Benn* are similar. Benn, like Paradis, knew of the experts' existence but had been supplied with evidence by the state that the experts' view supported the state's theory. A defendant furnished with such inculpatory evidence by the state is not required to assume that the state has concealed material information and has thereby obligated him to ascertain the *Brady* material on his own. In the case before us, moreover, the state not only failed to disclose the crucial information about the accidental nature of the fire, but it actually misled the defense by disclosing a part of the experts' findings that, read alone, would lead to a conclusion directly opposite to the one they reached.

[16] Evidence that the fire in Benn's trailer was *not* caused by arson and had been determined by fire officials to be accidental would have substantially undermined the state's principal theory of motive and its main support for the aggravating factor of common scheme or plan, as well as its contention that the killings were premeditated. Thus, we hold that the state's failure to disclose exculpatory evidence about the nature of the fire constitutes a *Brady* violation, independent of the *Brady* violation that resulted from the state's suppression of impeachment evidence. We also hold that the state court ruling regarding the exculpatory evidence was clearly erroneous and thus constituted an "unreasonable application" of clearly established Supreme Court precedent.

V. CONCLUSION

In *Bernal-Obeso*, we stated that "we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery. This responsibility includes the duty as required by *Giglio* to turn over to the defense in discovery all material information casting a shadow on a government witness's credibility." 989 F.2d at 334. Here, the state failed to take *any* measures to safeguard the system against treachery. To the contrary, the state suppressed material exculpatory and impeachment evidence that would have destroyed the credibility of its principal witness, severely undermined its theory of motive, and left it without substantial evidence of premeditation or an aggravating circumstance.

[17] Because the suppressed impeachment evidence and the suppressed exculpatory evidence are each, standing alone, sufficiently prejudicial to merit relief under *Brady*, they *a fortiori* are sufficiently prejudicial when analyzed together. Given the importance of both Patrick's testimony and the arson-insurance-fraud theory to the prosecution's case, as well as the sheer volume and damaging nature of the improperly withheld evidence, we conclude that the Washington Supreme Court's determination that there was no *Brady* violation was clearly erroneous and constitutes an unreasonable application of Supreme Court precedent. To say that we have a firm conviction that the state court erred in its application of *Brady* and its progeny would be a gross understatement indeed. Because our holding of a *Brady* violation necessarily comprehends a holding that the *Brecht* prejudice standard is met, we hold that Benn is entitled to habeas relief. We affirm the district court's decision granting Benn's petition for a writ of habeas corpus.

AFFIRMED.

TROTT, Circuit Judge, Concurring:

Lord Acton, the celebrated 19th century British historian and student of politics, formulated an observation

about government and human nature that aptly, and regrettably, fits this case: "Power tends to corrupt, and absolute power corrupts absolutely." It was for this reason that over one hundred years earlier, the Framers of our Constitution meticulously separated the powers given by the People to our government and erected against each a structural series of checks and balances designed to confront the potential for abuse. Then, by enacting the Bill of Rights, the Framers made certain that basic principles of a fair and just trial could not be episodically overridden, even by a unanimous legislature, an overzealous executive, or a wayward judiciary.

In large measure, the Framers were influenced by Charles de Secondat, baron de Montesquieu, an astute student of history and politics in his own right, who, in his seminal work *The Spirit of the Laws*, said:

> Democratic and aristocratic states are not in their own nature free. Political liberty is to be found only in moderate governments; and even in these it is not always found. It is there only when there is no abuse of power: but constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits?
>
> To prevent this abuse, it is necessary, from very nature of things, power should be a check to power.

This case provides us with a textbook example of the abuse of executive power contemplated by Montesquieu, Lord Acton, and the Framers of our Constitution. Rather than adhere to the clear letter of the law, which itself is the ultimate check against arrogation of power, the prosecutor apparently deliberately withheld from the trial court and from the jury admissible evidence that would cause any fairminded person to

have grave reservations about the credibility of a key government witness. The State's transgressions are well identified in dissent by Justice Johnson of the Supreme Court of Washington:

> The State withheld information from Benn's attorneys prior to and during his trial that the State was under direct court order to produce. The State violated the trial court's discovery order by failing to promptly provide a taped statement and documents received from Patrick regarding Benn's case. The State also violated a direct court order to produce information specific to Patrick's previous dealings with law enforcement officers.
>
> Testimony from the reference hearing also shows the State failed to list Patrick as a State witness until the eve of trial and prevented Benn's attorneys from interviewing Patrick until the day before trial by erroneously claiming Patrick was involved in a witness protection program. The State's misconduct deprived Benn of his Sixth Amendment right to fully cross-examine Patrick.

In re Benn, 952 P.2d 116, 153 (Wash. 1998) (Johnson, J., dissenting).

The law and truth-seeking mission of our criminal justice system, which promise and demand a fair trial whatever the charge, are utterly undermined by such prosecutorial duplicity. Although our Constitution guarantees to a person who liberty has been placed in jeopardy by the State the right to confront witnesses in order to test their credibility, that right was willfully impaired in this case. By unlawfully withholding patently damaging and damning impeachment evidence, the

prosecutor knowingly and willfully prevented Benn from confronting a key witness against him. Such reprehensible conduct shames our judicial system.

Prosecutors routinely take an oath of office when they become stewards of the executive power of government. That oath uniformly includes a promise at all times to support and defend the Constitution of the United States. Fortunately, the great majority of all prosecutors appreciate the solemnity of this oath. However, if a prosecutor fails to abide by this undertaking, it is the duty of the judiciary emphatically to say so. Otherwise, that oath becomes a meaningless ritual without substance.

To his credit, Washington's Attorney General does not defend the prosecutor's indefensible behavior, each aspect of which is accurately described in Judge Reinhardt's thorough opinion. In oral argument, counsel for the respondent readily conceded egregious wrongdoing, but argued nevertheless that on this record, the wrongdoing did not prejudice the petitioner. With all due deference to the Supreme Court of the State of Washington, I respectfully disagree, as do my colleagues, with the State's assessment of this issue. Thus, I join in Judge Reinhardt's explanation of our reasons and conclusions compelled here by the Constitution, and in my colleagues' decision in this case. Benn must be given that to which he is fully entitled and which he has not yet received: a fair trial.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GARY M. BENN, Petitioner, v. JOHN LAMBERT, Respondent.	NO. C98-5131FDB ORDER GRANTING PETITIONER'S MOTIONS FOR EXPANSION OF THE RECORD AND FOR SUMMARY JUDGMENT

No judge wishes to hold that another has erred. No judge is eager to rule that a convicted felon is entitled to a new trial. After thorough review of this matter, however, I am compelled to conclude that the petitioner's conviction is fatally flawed.

The petitioner was convicted of Aggravated First Degree Murder, and on June 12, 1990, sentenced to death. The petitioner's direct appeal was rejected, although Washington Supreme Court Justice Robert Utter, in dissent, concluded that the sentence of death was disproportionate. State v. Benn, 120 Wn.2d 631, 709, 845 P.2d 289 (1993) (Utter, J., dissenting). In later state collateral proceedings ("Personal Restraint Petition",

or "PRP"), the Washington Supreme Court transferred the PRP to the Pierce County Supreme Court to hold a "reference hearing" (essentially an evidentiary hearing) particularly regarding prosecution witness Roy Patrick.[1] In In re Benn, 134 Wn.2d 868, 952 P.2d 116 (1998), the Washington Supreme Court rejected the petitioner's issues and dismissed the PRP, but Justices Johnson and Sanders dissented, arguing that the prosecution's withholding of impeachment evidence pertaining to Witness Patrick violated the petitioner's constitutional rights. Justices Johnson and Sanders believed the petitioner to be entitled to a new trial.

Both the petitioner and the respondent have filed motions for summary judgment.

FACTUAL BACKGROUND

On February 10, 1988, the petitioner shot and killed his half-brother, Jack Dethlefsen, and Dethlefsen's friend, Michael

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[1] The petitioner has moved for "expansion of the record" to include the proceedings of the reference hearing and other evidentiary, items. I will allow this expansion.

Nelson, in the living room of Dethlefsen's house. At autopsy, Dethlefsen had a blood alcohol level of .07, and valium and codeine in his blood. Nelson had a blood alcohol level of .11. Dethlefsen and Nelson were shot with a .45 caliber handgun. Evidence existed that the handgun was owned by Dethlefsen, and was kept of the coffee table next to the couch in the living room; Benn owned a .22 caliber handgun, but left it in his vehicle when he went to Dethlefsen's house. Neither party at trial established that the murder weapon belonged to Dethlefsen.

The jury found the petitioner guilty of the premeditated murder of both victims, with the aggravating factor that the murders were part of a common scheme. Two of the theories advanced by the prosecution fit this finding: First, that the victims had conspired with the petitioner to perpetrate an insurance fraud (burglary and arson of the petitioner's trailer), that the petitioner had refused to share the proceeds, that the victims were threatening to expose the fraud, and that the

petitioner killed them to prevent them from alerting the police; second, that Benn was angry upon learning that he had been left out of Dethlefsen's will. And only one witness directly supported these theories: Roy Patrick, a "jail house informant" who testified that the defendant had confessed to him while they shared a jail cell.

The petitioner charges that the prosecution withheld material exculpatory evidence in violation of his right to due process.

STANDARD

The Antiterrorism and Effective Death Penalty Act of 1996 provides that federal habeas relief shall not be granted on any claim that was adjudicated on the merits on state court proceedings unless the State's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

A state violates a defendant's due process rights when it fails to disclose to the defendant "evidence favorable to an accused ... where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Brady compels the disclosure of material evidence whether it has impeachment value or is directly exculpatory. Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999).

> [A] showing of materiality does not require demonstration by a preponderance that disclosure would have resulted in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation of the crime that does not inculpate the defendant). *Bagley's* [[2]] touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression

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[2] United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L. Ed.2d 481 (1985).

"undermines confidence in the trial." *Bagley*, 473 U.S., at 678, 105 S.Ct., at 3381.

Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 1566, 131 L.Ed .2d 490 (1995).

Further, the Supreme Court has made clear that the cumulative effect of all suppressed evidence is considered, rather than item by item. *Id.*, 115 S.Ct. at 1567. Finally, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.*

Like Justices Johnson and Sanders of the Washington Supreme Court, I cannot escape the conclusion that the prosecution's suppression of exculpatory evidence *seriously* undermined confidence in Mr. Benn's trial.

DISCUSSION

The defense argued a theory of self defense and lack of premeditation. Benn was at Dethlefsen's house for an hour prior to the killings. He had a .22 caliber pistol in his car, but did not bring it inside Dethlefsen's house. Evidence was

presented that Benn discovered that Dethlefsen had been making harassing telephone calls to Benn's ex-girlfriend (Gail Fisk), and confronted him. Benn told his brother Monte that he had found Fisk's number in Dethlefsen's kitchen. As noted above, evidence existed, but was not presented at trial, that the murder weapon belonged to Dethlefsen, and customarily was kept on Dethlefsen's coffee table. Evidence was presented that the angles of the first bullet wounds in both victims were consistent with the victims moving towards the shooter. Dethlefsen had evidently moved from the couch to his gun cabinet (the glass cover of which was broken); his baseball bat was next to his body. The defense theory was that Dethlefsen and Benn argued over the harassing telephone calls, that Dethlefsen had moved for his handgun, that Benn wrestled the handgun away, and shot Dethlefsen, and Nelson as they threatened him. At autopsy, Dethlefsen had a blood alcohol level of .07, and valium and codeine in his blood. Nelson had a blood alcohol level of .11. All of the above are consistent with

the defense theory that Benn spontaneously quarreled with Dethlefsen, leading to the shooting, rather than going to Dethlefsen's house for the purpose of executing Dethlefsen and Nelson to cover his involvement in insurance fraud.

The only direct evidence to support the prosecution's theory of premeditated murder in the furtherance of a common scheme came from Roy Patrick. However, the defense was never allowed adequate opportunity to cross examine and impeach this critical witness:

-In violation of the Washington State criminal rules and trial court rulings, the identity of Roy Patrick was not disclosed until the day before trial. Pierce County Assistant Prosecuting Attorney Mike Johnson falsely told the defense that Patrick's identity could not be disclosed because he was in a witness protection program. In re Benn, 134 Wn.2d at 944-45 (dissent).

-Patrick testified that Benn had had Dethlefsen and Nelson "burn his trailer to collect some insurance money which they were supposed to get half or a portion of the money" (3

REC 1550) and that when Benn refused to pay, "they threatened to go to the police and with the excuse that they could probably get immunity" for informing. The prosecution failed to disclose that deputy fire marshal Ted Thompson and electrical inspector Walter Erickson both determined that the fire in Benn's trailer was accidental, and that Erickson reported that Benn's heater had been recalled by its manufacturer for its tendency to cause fires.[3]

-Patrick had worked as a police informant for 15 years at the time of trial. Defense Attorney Thoenig demanded discovery about all of Patrick's police contacts. The trial judge ruled that the prosecution would be required to provide "any written material that you're able to procure from the various law enforcement official with whom the confidential informant may have had contacts" in the previous year. 1 REC 362. It

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[3] The respondent argues that the cause of the fire "was not critical to the state's insurance fraud theory. The important fact was that, after a fire and burglary in his mobile home, Benn claimed a greater loss against his insurance that he had actually sustained." Response at 5. However, the cause of the fire *was* material to the credibility of Patrick, and gravely undercuts the fear of police exposure.

was later disclosed, in the reference hearing before Pierce County Superior Court Judge Strombom, that the prosecution never sought this information.

-There was significant evidence of unreliability and dishonesty in Roy Patrick's dealings with police. The late disclosure of Patrick's identity prevented the defense from doing any meaningful investigation of Patrick-and there was much evidence of a history of defrauding law enforcement officials. See petitioner's Memo in support of SJ at 45-46, summarizing Patrick's history as an informant in California, and his attempted scam of prison officials while incarcerated in a federal facility.

-Detective Lewis, at the reference hearing before Judge Strombom, related that Patrick was given $800 of Tacoma Police Department money to make a heroin purchase; but rather than turn in the heroin intact, he used some, and cut the rest to make up the lost weight. Another police officer, Detective Thomas Padukiewicz, had Patrick buy $2,400 of

heroin from James Grosz. There was evidence that Patrick cut the heroin purchased, and pocketed $1,000 from the transaction.

-Patrick plainly perjured himself (denying any cocaine use) in testifying in another trial prior to the Benn trial.

-There was ample evidence, known to the police, that Patrick used and sold drugs throughout the period that he worked for the Police Department as an informant, in violation of his agreement with law enforcement officials.

-Patrick testified at Benn's trial that he benefitted from his testimony only in that the Prosecutor's Office had agreed to recommend a three month reduction in sentence in Patrick's pending arson case. Prosecutor Johnson at closing argument minimized the effect of prosecutorial inducement: "The reward that he got was that in a 6 to 12 month sentence he got six months instead of nine months. Big reward." 5 REC 2375. Instead, there is ample evidence that the prosecutors shielded

Patrick from prosecution for other crimes, and that police provided him money during the trial.

-Patrick was in violation of the terms of his probation, and had fled pending theft charges in Olympia, but the prosecutors' action in procuring an unusual out-of-state subpoena under RCW 10.55 shielded Patrick from being served with any warrants while in Washington to testify. At the time of Patrick's testimony, he had accumulated five outstanding warrants. On May 8, 1990, during the course of the trial, Patrick was arrested for driving on a suspended license, and taken to jail. He was released in the morning; jail records indicate that Prosecutor Johnson instructed the jail officer to release him without charge. 15 REC 7112.

-While in Seattle to testify, Patrick was provided a hotel room at county expense. During Benn's trial, on May 21, 1990, Tacoma police officers, unaware that Patrick was a witness in the Benn case, raided the motel room and found items of drug paraphernalia. There was evidence that Patrick used and sold

large quantities of cocaine while staying in the motel during Benn's trial.[4] The defense was not allowed to cross-examine as to this evidence of drug use.

-Melvin Stevens, the confidential informant whose information supported the search warrant, stated that Patrick had stated that his out-of-state provided immunity from prosecution, and that he (Patrick) had received a large amount of money from an attorney to testify against Benn.[5]

-Melvin Stevens related that Patrick admitted that he intended to lie on the stand in order to please the prosecution.

-Melvin Stevens' identity was not disclosed to the defense.

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[4] At the reference hearing, Patrick admitted to having a large sum of money (from cheating a drug buyer while on his way to Washington to testify) and indulging in heavy drug use during his stay in the motel. 14 REC 6751, 14 REC 6781.

[5] Consistent with Steven's testimony, Sherrie Woodard, who was in Patrick's motel room at the time of the raid, testified at the reference hearing that Patrick had swallowed several rocks of cocaine when he saw the officers, and that the officers saw the cocaine pipe, then full of cocaine, that Patrick had on hand. She further testified to unusual contacts between Patrick and plainclothes police officers at the time of Benn's trial.

In short, there was evidence not disclosed to defense which, if believed by the jury, would have painted a primary prosecution witness as completely unreliable, a liar for hire, ready to perjure himself for whatever advantage he could squeeze out of the system, for every possible advantage. Nor can I agree with the respondent that Patrick was "sufficiently impeached." The facts discussed above paint a considerably darker picture than did the facts actually presented to the jury. I also cannot discount the impact upon jury confidence that the State was compelled to rely upon such an unreliable witness for such a key point.

The petitioner also correctly argues that the nondisclosure of specifically requested information twisted the strategy the defense followed in cross- examining Patrick.

> [T]he more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.

Bagley, *supra*, 105 S.Ct. at 3384. The defense specifically requested evidence of Patrick's misconduct as an informant, the trial judge ordered such evidence to be produced, and the prosecution produced nothing despite ample evidence of Patrick's fraudulent conduct as a government informant.

The respondent does not dispute Roy Patrick's unreliability. Instead, the respondent attempts to down-play the importance of Patrick's testimony: "Contrary to Benn's allegations, Mr. Patrick was not the key witness on which the prosecution's case turned. The key evidence in the case was the blood spatters on Benn's boot and Benn's admissions to his brother Monte and others that he had killed the victims." Response at 4. Yet the petitioner does not dispute that he killed Dethlefsen and Nelson; what *is* disputed is whether he killed them with premeditation and as part of a common scheme.

As the dissent noted,

> [t]he significance of Patrick's testimony cannot be overstated. Patrick testified as to Benn's confession and as to diagrams made by Benn regarding the murders. His testimony provided crucial evidence for the State. This court

> ordered a reference hearing because of its concerns over the State's actions with regard to Roy Patrick. The testimony from the reference hearing show the court's concern was warranted.

In re Benn, 134 Wn.2d at 947.

There was little other evidence of premeditation and common scheme. It is further noted that the prosecution at the sentencing phase made much point of characterizing Benn as a danger even in incarceration, relying upon Patrick's testimony that Benn, while in jail, had sought Patrick's help in killing a witness.

Because I agree that the petitioner has shown a " 'reasonable probability' of a different result", I will not address the other issues raised by the petitioner, nor the other arguments raised by the respondent. I am compelled to conclude that the petitioner was denied his right to due process, and that his conviction must be vacated. It is hereby

ORDERED:

(1) That the petitioner's Motion for Expansion of the Record is GRANTED;

(2) That the petitioner's Motion for Summary Judgment is GRANTED and the petitioner's conviction VACATED and a new trial ordered; and

(3) That the respondent's Motion for Summary Judgment is DENIED.

DATED this 30th day of June, 2000.

/s/
FRANKLIN D. BUGESS
UNITED STATES DISTRICT JUDGE

[No. 57272-1. En Banc.]

THE STATE OF WASHINGTON, Respondent, v. GARY MICHAEL BENN, Appellant.

[1] Homicide -- Aggravated First Degree Murder -- Guilt Phase -- Standard of Review. Errors alleged in the guilt phase of a capital case are reviewed under the same standard as errors alleged in noncapital cases.

[2] Criminal Law -- Punishment -- Death Penalty -- Review -- Heightened Scrutiny -- What Constitutes. Errors alleged in the sentencing phase of a capital case are given heightened scrutiny. "Heightened scrutiny" means a closer, more careful review of the record; it does not mean a higher standard of review.

[3] Criminal Law -- Discovery -- Failure To Disclose -- Harmless Error -- Test. The State's failure to disclose impeachment or exculpatory information to a criminal defendant requires a reversal of the defendant's conviction only if there is a reasonable probability that the result of the proceeding would have been different if the information had been disclosed. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the proceeding.

[4] Witnesses -- Cross Examination -- Scope -- Discretion of Court. The scope of cross examination is a matter within the trial court's discretion.

[5] Witnesses -- Impeachment -- Relevance to Credibility on Specific Issue. A witness's conduct must be relevant to the witness's credibility regarding the subject of the

witness's testimony in order to be admissible for impeachment purposes under ER 608(b).

[6] Criminal Law -- Evidence -- Other Offenses or Acts -- Standard of Proof. A prior wrongful act offered under ER 404(b) must be proved to the court by a preponderance of the evidence.

[7] Criminal Law -- Evidence -- Other Offenses or Acts -- Review -- Sufficiency of Evidence. A trial court finding that a prior wrongful act offered under ER 404(b) was proved by a preponderance of the evidence will be upheld if it is supported by substantial evidence.

[8] Evidence -- Relevance -- Balanced Against Prejudice -- Review. A trial court's weighing, pursuant to ER 403, of the probative value of evidence against its prejudicial

effect is reviewed under the abuse of discretion standard.

[9] Trial -- Instructions -- Evidence in Support -- Necessity. A proposed instruction should not be given if it is not supported by the evidence.

[10] Trial -- Instructions -- Proposed Instructions -- Error. A proposed instruction that misstates the applicable law should not be given.

[11] Trial -- Instructions -- Proposed Instructions -- Repetitive Instructions -- In General. A proposed instruction need not be given if, evaluated in the context of the instructions as a whole, it is collateral to or repetitious of instructions already given.

[12] Criminal Law -- Advisement of Rights -- Necessity -- Statement to Private Person. Incriminating statements made to a private person need not be preceded by an advisement of Miranda rights and a voluntary waiver of such rights.

[13] Criminal Law -- Confessions -- Voluntariness -- Determination -- Question of Law or Fact. The voluntariness of a confession is an issue of law for the trial court.

[14] Criminal Law -- Lesser Included Offense -- Instruction -- Necessity -- Evidence in Support -- In General. A lesser included offense instruction should not be given absent evidence that the defendant did in fact commit the lesser offense.

[15] Appeal -- Review -- Issues Not Raised in Trial Court -- Instructions -- Complex Nature. The complex nature of jury instructions is not, by itself, an error of constitutional magnitude warranting review for the first time on appeal under RAP 2.5(a)(3).

[16] Appeal -- Assignments of Error -- Authority -- Necessity. An appellate court need not decide a contention that is not supported by citation to authority.

[17] Criminal Law -- Insanity -- Competency To Stand Trial -- Ability To Choose Trial Strategy. A criminal defendant may be competent under the standard of RCW 10.77.010(6) and .050 even if the defendant is unable to choose or suggest trial strategy.

[18] Criminal Law -- Insanity -- Competency To Stand Trial -- Review -- Standard of Review. A trial court's

determination of a criminal defendant's competence is reviewed under the abuse of discretion standard.

[19] Evidence -- Opinion Evidence -- Expert Testimony -- Conflicting Testimony -- Credibility. The credibility of experts offering conflicting testimony is for the trier of fact.

[20] Criminal Law -- Right to Counsel -- Effective Assistance of Counsel -- Test. A criminal defendant is denied effective assistance of counsel only if (1) the attorney's actions fall below a minimum objective standard of reasonable attorney conduct and (2) the outcome of the proceeding probably would have been different but for the attorney's actions.

[21] Criminal Law -- Punishment -- Death Penalty -- Special Sentencing Procedure -- Effective Assistance of

Counsel -- Standard. The standard for determining whether a criminal defendant was afforded effective representation is the same for the penalty phase of a capital case as for any other criminal proceeding.

[22] Criminal Law -- Right to Counsel -- Effective Assistance of Counsel -- Context -- Hindsight. An evaluation of the effectiveness of the representation provided a criminal defendant is made from the attorney's perspective as of the time the attorney represented the defendant. The attorney's assistance may not be second-guessed with the benefit of hindsight.

[23] Criminal Law -- Right to Counsel -- Effective Assistance of Counsel -- Presumption. There is a strong presumption that an attorney representing a criminal defendant rendered adequate assistance and

made all significant decisions in the exercise of reasonable professional judgment.

[24] Criminal Law -- Right to Counsel -- Effective Assistance of Counsel -- Trial Strategy -- Information Supplied by Defendant. A strategic decision made by a criminal defense attorney based on information provided by the defendant cannot be a basis for a later claim of ineffective representation.

[25] Criminal Law -- Punishment -- Death Penalty -- Validity -- Mandatory Nature. RCW 10.95 does not impose an unconstitutional mandatory sentence of death.

[26] Criminal Law -- Punishment -- Death Penalty -- Validity -- Prosecutorial Discretion. RCW 10.95

contains adequate standards to guide its exercise by the State and is constitutional.

[27] Indictment and Information -- Grand Jury -- Necessity -- Capital Case. A capital defendant may be charged by an information rather than by an indictment.

[28] Criminal Law -- Punishment -- Death Penalty -- Special Sentencing Procedure -- Presumption of Innocence -- Applicability. A presumption of innocence does not apply in the penalty phase of a capital case.

[29] Criminal Law -- Punishment -- Death Penalty -- Special Sentencing Procedure -- Mitigating Circumstances -- Statutory Query -- Validity. RCW 10.95.060(4), which requires a jury in the penalty phase of a capital case to answer whether it is convinced beyond a reasonable doubt that there are not sufficient mitigating

circumstances to merit leniency, satisfies due process and the Eighth Amendment.

[30] Criminal Law -- Punishment -- Death Penalty -- Special Sentencing Procedure -- Mitigating Circumstances -- Separate Findings -- Unanimity. In the penalty phase of a capital case, jurors are not required to make separate findings on each alleged mitigating factor or to agree unanimously as to the presence of such factors.

[31] Criminal Law -- Punishment -- Death Penalty -- Special Sentencing Procedure -- Validity -- Legislative Encroachment on Executive Power. By prescribing sentencing procedures and establishing standards for the exercise of prosecutorial discretion in death penalty cases, RCW 10.95 does not constitute an encroachment by the Legislature on the powers of the executive.

[32] Criminal Law -- Punishment -- Sentence -- Authority -- Legislature or Executive. The Legislature has plenary power over sentencing; the executive's power over sentencing is limited to that which is delegated by the Legislature.

[33] Criminal Law -- Punishment -- Death Penalty -- Special Sentencing Procedure -- Validity -- Legislative Encroachment on Judicial Power. RCW 10.95, the death penalty statute, does not constitute an encroachment by the Legislature on the powers of the judiciary.

[34] Criminal Law -- Punishment -- Death Penalty -- Validity -- Prosecutorial Discretion. The discretion granted to a prosecutor under RCW 10.95 to seek the death penalty does not violate the equal protection

rights of a defendant charged with aggravated first degree murder.

[35] Criminal Law -- Punishment -- Death Penalty -- Validity -- Double Jeopardy. Imposing the death penalty on a person convicted of aggravated first degree murder based on the absence of sufficient mitigating circumstances meriting leniency (RCW 10.95.060(4)) does not violate the constitutional double jeopardy prohibition.

[36] Criminal Law -- Trial -- Instructions -- Definition of Element -- Preservation for Review. The need for a definition of a term used in an instruction is not an issue of constitutional magnitude that may be raised for the first time on appeal.

[37] Homicide -- Aggravated First Degree Murder -- Aggravating Circumstances -- Multiple Murder Victims -- Common Scheme or Plan -- Single Act -- Definition -- Necessity. An instruction regarding the aggravating circumstance of multiple murders which were part of a common scheme or plan or the result of a single act (RCW 10.95.020(8)) need not define the phrases "common scheme or plan" or "single act".

[38] Criminal Law -- Punishment -- Death Penalty -- Special Sentencing Procedure -- Instructions -- Leniency -- Definition -- Necessity. An instruction in the sentencing phase of a capital case requiring the jury to determine whether there are not sufficient mitigating circumstances to merit leniency (RCW 10.95.060(4)) need not define the term "leniency".

[39] Criminal Law -- Punishment -- Death Penalty -- Special Sentencing Procedure -- Right of Allocution -- Objection -- Comment on Right To Remain Silent. A prosecutor's objection to a defendant's giving a personal version of the criminal events while exercising the right of allocution at the special sentencing phase of a capital case does not constitute an unconstitutional comment on the defendant's silence during the guilt-finding phase of the case.

[40] Criminal Law -- Punishment -- Death Penalty -- Special Sentencing Procedure -- Prosecutor's Conduct -- Argument -- Harmless Error. A capital defendant seeking relief based on improper argument by a prosecutor during the special sentencing phase of the case has the burden of establishing that the prosecutor's statement was improper and that there is a substantial likelihood that the statement affected the jury finding.

[41] Criminal Law -- Punishment -- Death Penalty -- Special Sentencing Procedure -- Prosecutor's Conduct -- Argument -- Scope. During the special sentencing phase of a capital case, the prosecutor may remind the jurors that they are officers of the court and make arguments that are based on properly admitted evidence and that are not calculated to arouse the passions of the jury.

[42] Criminal Law -- Punishment -- Death Penalty -- Special Sentencing Procedure -- Mitigating Circumstances -- Taking Case From Jury -- Sufficiency of Evidence. There is sufficient evidence to justify an affirmative finding to the question posed by RCW 10.95.060(4) if any rational trier of fact, viewing the totality of the evidence most favorably toward the State, could have

found beyond a reasonable doubt that leniency was not merited.

[43] Criminal Law -- Punishment -- Death Penalty -- Review -- Proportionality -- Purpose. The purpose of the proportionality review required by RCW 10.95.130(2)(b) is to safeguard against the imposition of death sentences based on the defendants' race or in an arbitrary and capricious manner.

[44] Criminal Law -- Punishment -- Death Penalty -- Review -- Proportionality -- Statutory Procedure -- In General. Proportionality review under RCW 10.95.130(2)(b) cannot ensure that the death penalty is always imposed in superficially similar circumstances. The court looks for family resemblances in similar cases. Merely adding up aggravating and mitigating factors is not a substitute for an informed analysis.

[45] Criminal Law -- Punishment -- Death Penalty -- Review -- Proportionality -- Test. A death sentence is not disproportionate under RCW 10.95.130(2)(b) if in similar cases throughout the state the death penalty has been imposed generally and imposition in the present case would not be wanton and freakish.

[46] Criminal Law -- Punishment -- Death Penalty -- Review -- Proportionality -- Factors. The Supreme Court undertakes the proportionality review required for capital cases (RCW 10.95.130(2)(b)) by evaluating the nature of the defendant's crime, the aggravating factors present, and the defendant's prior convictions and personal history.

[47] Criminal Law -- Punishment -- Death Penalty -- Review -- Passion or Prejudice -- Rejected Contentions. A

capital defendant claiming that the death sentence was "brought about through passion or prejudice" (RCW 10.95.130(2)(c)) cannot rely on allegations which the appellate court previously found to be either nonmeritorious or nonprejudicial.

[48] Criminal Law -- Punishment -- Death Penalty -- Validity -- Cruel Punishment. The death penalty as imposed under RCW 10.95 does not constitute cruel and unusual punishment.

[49] Criminal Law -- Punishment -- Death Penalty -- Speical Sentencing Procedure -- Notice -- Signature by Deputy Prosecutor -- Filing by Designee. A deputy prosecuting attorney's signing a notice to seek a special sentencing proceeding and a designee's filing the notice does not violate RCW 10.95.

[Note: Only 2 Justices concur in all of the above statements.]

DURHAM, BRACHTENBACH, DOLLIVER, and ANDERSEN, JJ., concur by separate opinion; UTTER, SMITH, and JOHNSON, JJ., dissent in part by separate opinion; MADSEN, J., did not participate in the disposition of this case.

Nature of Action: Prosecution for two counts of aggravated first degree murder.

Superior Court: The Superior Court for Pierce County, No. 88-1-01280-8, Donald H. Thompson, J., on June 12, 1990, entered a judgment on a verdict of guilty and a sentence of death.

Supreme Court: Holding that the State's failure to disclose certain information did not require reversal; that the

trial court did not abuse its discretion in limiting the cross examination of a witness; that evidence of the defendant's involvement in insurance fraud with the murder victims was admissible; that the trial court did not err in refusing proposed instructions; that the defendant was competent to proceed with the penalty phase of the trial; that the defendant was not denied effective representation; that the death penalty statutory procedures followed were valid; that the issue of the absence of definitions of terms in instructions was not preserved for review; that the prosecutor had not unconstitutionally commented on the defendant's silence; that the prosecutor's closing argument in the penalty phase was not prejudicial; that the death sentence was comparatively proportionate to sentences imposed in similar cases; that the death sentence was not arbitrarily, wantonly, or freakishly imposed and was not the result of passion or prejudice; and that the notice to seek a special sentencing proceeding was properly signed and filed, the court affirms the conviction and death sentence.

Gary Benn, pro se, Gregg Eric Johnsen, and Constance O'Brien Bartholomew, for appellant.

John W. Ladenburg, Prosecuting Attorney, and Kyron Huigens, Deputy, for respondent.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON	)	
	)	
Respondent,	)	No. 57272-1
	)	
v.	)	
	)	EN BANC
GARY MICHAEL BENN,	)	
	)	
Appellant.	)	Filed FEB 11 1993

GUY, J. -- Gary Michael Benn was convicted by a jury in Pierce County Superior Court on two counts of aggravated

first degree murder. During the sentencing phase of Benn's case, the jury determined there were not sufficient mitigating circumstances to warrant leniency, and Benn was sentenced to death. Benn appealed directly to this court pursuant to the mandatory review provisions of Washington's capital sentencing statute, RCW 10.95.100. Finding no reversible error, we affirm both the jury's conviction of Benn and its sentencing verdict.

FACTS

On February 10, 1988, Gary Michael Benn made a 911 call to the Pierce County Sheriff's Department and reported finding two bodies at a residential address he gave in Puyallup, Washington. Officer Junge of the Pierce County Sheriff's Department responded, arriving at the scene at 4:35 p.m. There was no one outside the residence, and Officer Junge requested through his radio that the 911 caller come outside the house. Gary Benn came outside and met Officer Junge.

Inside the residence, Officer Junge found the bodies of two adult males: Jack Dethlefsen (Benn's half-brother) and Michael Nelson (a friend of Jack Dethlefsen's). Officer Junge checked for vital signs and found none. He then checked for wounds on the bodies. He found a blood patch on the back of Jack Dethlefsen's shirt and a bullet wound in Mike Nelson's jacket. Officer Junge also noticed head wounds on each victim. Officer Junge also noticed a .45-caliber handgun lying on the floor between the elbow and knee of Mike Nelson. The gun was in a half-cocked position. No one else was found in the house. Officer Junge took 15 photographs of the crime scene, including photos depicting the position of the bodies with their wounds. He noted a baseball bat and a gun cabinet near where Jack Dethlefsen lay. Officer Junge checked the vehicles located in front of the house and found that Benn's Cadillac had no engine heat and little, if any, radiator warmth.

Deputy Jones of the Pierce County Sheriff's office arrived shortly after Officer Junge and observed shell casings

around both victims. He also noticed that the gun cabinet nearest to victim Dethlefsen had been broken and that glass from the cabinet was lying next to Dethlefsen's right elbow. Deputy Jones compared a tread pattern of a shoe or boot from the glass shard to the sole of Benn's boot and concluded they were the same pattern. Deputy Hilding Johnson of the Pierce County Sheriff's office also made a similar comparison of the footprint and Benn's boots.

Dr. John Howard, a Pierce County pathologist, performed autopsies on both the bodies of Dethlefsen and Nelson. He found similar wounds to both bodies. Each had a gunshot wound entering the chest and exiting the back, and each had a gunshot wound to the back of the head or neck entering from the rear and exiting from the front. Dr. Howard determined that either shot to each victim would have been fatal. It was his opinion that the shot to the chest would have occurred first in each case, and that after such a shot to the

chest it would be possible for the victims to have walked, crawled or moved for several seconds.

Police investigation disclosed that earlier on the afternoon of February 10, 1988, three boys met to play football in the street in front of the crime scene. These boys saw a man they later identified as Gary Benn enter the house at about 3:15 p.m. They saw no one leave the house between 3 and 4:10 p.m.

Other trial testimony established that Gary Benn had been at a barber shop owned by his friend, Larry Kilen, from about 1:30 in the afternoon until just before 3 p.m. Benn made several telephone calls during this time. One telephone call provoked Benn's concern regarding events at Jack Dethlefsen's house, and Benn left soon after. Larry Kilen believed Benn was intending to travel directly to Dethlefsen's house.

On May 9, 1988, after several weeks of investigation into the killings, Gary Benn was arraigned on two counts of aggravated first degree murder. After his arraignment, Benn told several persons that he had shot and killed Dethlefsen and

Nelson. Roy Patrick, a jailhouse informant who had previously worked as an informant regarding narcotics investigations with Tacoma police, testified that Benn asked him if he knew anyone who liked life in jail better than life in the outside world. Although Patrick had no intention of helping Benn find a person willing to take responsibility for the murders, he told Benn he did know such a person. According to Patrick, Benn then offered to bail Patrick out of jail if Patrick would find a person who would agree to volunteer to confess to Benn's crimes. As part of this plan, Benn gave Patrick details of the murder incident that only the murderer would know. Benn drew diagrams for Patrick showing the positions of Dethlefsen and Nelson at the moment they were shot. One of the diagrams Benn had given Patrick had Benn's fingerprints on it. After receiving the diagrams, Patrick contacted authorities with the information Benn had given him and offered to make a deal to testify for the State.

Patrick testified that Benn said he had been arguing with Dethlefsen and Nelson when Dethlefsen leaned for a gun on a nearby table. Benn said he reached the weapon first and shot Nelson and then Dethlefsen. Benn explained that he shot both men in the back of the head to assure they were dead. Patrick testified that Benn admitted that he, Dethlefsen, and Nelson had created phony insurance claims, with Dethlefsen and Nelson faking a burglary of Benn's mobile home and burning it to create the loss. Benn did not give a share of the insurance proceeds to Dethlefsen or Nelson, spending the insurance money on a Cadillac and a mobile home park. Benn indicated to Patrick that Dethlefsen and Nelson were about to go to the police to expose Benn in their frustration.

Benn's brother, Monte Benn, also testified that Benn had confessed to the killings. Monte stated that Benn told him Dethlefsen made harassing and threatening phone calls to Benn's ex-girlfriend, and Benn and Dethlefsen were arguing about the calls just before Benn killed Dethlefsen and Nelson.

Benn initially told Monte that on the afternoon of the murders he had left Larry's Barber Shop, waited for a prospective tenant at his trailer park, and then proceeded to Dethlefsen's house. He later changed the story, saying he had gone to South Tacoma Way to pick up a prostitute before going to Dethlefsen's. He claimed, variously, that he picked her up for himself, that he picked her up for Dethlefsen, and that he returned her to South Tacoma Way because Dethlefsen was too drunk. Benn also told Monte that as he entered Dethlefsen's house, someone put a gun to his head and threatened to kill his children if he ever mentioned the murders. Later Benn claimed someone he never saw put a gun to his head and made him kill Dethlefsen and Nelson. Monte testified that Benn told "quite a few" different versions of his activities on the day of the murders. Finally, however, on May 20, 1989, during a visit by Monte to Benn while Benn was in custody, Benn admitted killing Dethlefson and Nelson.

Denver Carter, a friend and former business associate of Benn's, testified that Benn confessed to the killings of Dethlefsen and Nelson some 6 or 7 months after the murders. Denver Carter met Benn in February 1988, the month of the murders, when Benn began work at the same sales office as Carter. Carter moved into Benn's home in May 1988 and lived with Benn until October 1988. Carter testified that during a camping trip in August or September 1988, after Carter had brought up the subject of the killings many times, Benn admitted to the murders: "Just said he went over to the house and he just did it." Report of Proceedings, at 1905.

There was a substantial amount of circumstantial evidence linking Benn to the two murders. Benn's left boot was spattered with 13 or 14 drops of blood. The samples were too small for species analysis. According to police experts, however, the pattern of spatter itself was sufficiently singular to prove the blood came from Mike Nelson's head wound. A footprint found on a piece of broken glass from the gun cabinet

indicated that when Nelson was shot in the head, the murderer was standing directly over Nelson with his foot near Nelson's head. The experts testified that the muzzle of the gun was in such proximity to the back of Nelson's head that gases penetrated the scalp and built up between the skull and scalp "causing a ballooning effect". Blood between the scalp and skull then spattered out in tiny droplets in a phenomenon unique to such contact wounds known as "blowback". The blood on Gary Benn's boot was identified by Pierce County investigators as high speed blood spatter that is a "blowback" from a contact wound.

A newspaper found on the couch where Benn told Patrick Dethlefsen was sitting had a bullet hole in it and was soaked with blood. The blood was of Dethlefsen's type. Benn had told Patrick that he had had a fight with Dethlefsen the night before the murder, which left blood all over the kitchen. There was blood found in the kitchen which was of Dethlefsen's type.

While officers conducting the initial investigation of the scene had observed that the boot print on the glass near Nelson's head matched the boots worn by Benn at the time, Benn denied to them that he had been near the bodies. Benn had claimed that he discovered the bodies and called 911 immediately on arriving at Dethlefsen's house. By Benn's account, the officers arrived 15 minutes later. Benn's car engine, engine oil, and radiator, however, were cold at the time the investigating officers arrived. Benn claimed that he had left Larry's Barber Shop between 2:30 and 3 p.m., had spent an hour to an hour and a quarter at his house, and then drove to Dethlefsen's. The boys playing in front of the crime scene testified that Benn arrived between 3 and 3:15 p.m.

Other circumstantial evidence of Benn's guilt included the following: the owner of Larry's Barber Shop testified that Benn had an angry telephone conversation with Dethlefsen just before Benn left the barber shop a few minutes before 3 p.m. An investigator for the county medical examiner who

examined the bodies at the scene shortly after 5 p.m. placed the time of death as approximately 3 p.m. The day following the killings, Benn attempted to persuade a neighbor to provide him with an alibi for the time of the murders.

There was also evidence presented of a previous attempt by Benn to hire someone to kill Jack Dethlefsen for him. Benn told Patrick that he had hired "Pete", a former tenant of Benn's trailer park, to kill Dethlefsen. Walter Peter Hartman was located during Benn's trial. Hartman testified that in January 1988, Benn had asked him to shoot someone named Jack. Hartman testified that Benn drove him to Dethlefsen's home, described how Hartman was to shoot Dethlefsen when he answered the door, and showed Hartman a gun he was to use in the killing. Hartman testified Benn told him that Benn wanted Dethlefsen to die because Dethlefsen had molested, raped or assaulted members of Benn's family. (Roy Patrick testified that Benn also wanted "Pete" killed by the person

whom Benn had asked Patrick to find to take responsibility for Benn's crimes.)

Denver Carter gave testimony that Benn told Carter a "Pete" owed Benn a favor and that he had a job for him. Carter testified that Benn also told him that when he called Dethlefsen's house the day of the killings, "nobody was supposed to answer the phone".

At arraignment on aggravated first degree murder charges on May 9, 1988, the prosecutor informed defense counsel that the State was contemplating filing a death penalty notice under RCW 10.95.040(1) and that information in mitigation should be presented to the prosecutor's office by May 23, 1988. The information counsel presented in mitigation related to Benn's character and the impact his execution would have on his family. The elected prosecutor, John Ladenburg, made the final decision to seek the death penalty. The death penalty notice was signed by a deputy prosecuting attorney and filed on June 7, 1988.

After notice was filed, Benn obtained new counsel. Benn's initial counsel were permitted to withdraw for cause. His new trial counsel presented additional mitigating evidence to the prosecuting attorney. As before, the mitigation was limited to evidence regarding the defendant's character and family. In June 1989, the prosecuting attorney offered to request the court to withdraw the death penalty notice in exchange for a plea of guilty to two counts of aggravated first degree murder. Aside from that possible bargain, however, the prosecutor declined to request withdrawal of the notice, being unpersuaded that there were sufficient mitigating factors to merit leniency.

While Roy Patrick, the jail inmate to whom Benn had confessed, was waiting to testify against Benn, another police informant reported that Patrick was dealing drugs from Patrick's room at a Tacoma motel. A search warrant was issued and executed. Nothing involving criminal activity was found in Patrick's motel room.

In preparation for trial, the defense made a general request under CrR 4.7(a)(3) and Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), for all exculpatory evidence. The fact that a search warrant had been issued and executed on Patrick's motel room based on an informant's tip alleging that Patrick was dealing narcotics was not disclosed to the defense team. When the defense did learn of the warrant from other sources, they made a request for the information and it was provided to them. Defense counsel then sought to interview the informant against Patrick. The trial judge held an in camera interview with the informant and informed the defense of the information learned in that interview. The trial judge denied defense motions for a continuance, a mistrial, to strike Patrick's testimony, or to recall Patrick for further cross examination on the drug dealing allegations. The court held that the allegations were not relevant to Patrick's truthfulness or untruthfulness under ER 608(b) because they occurred long

after his jail conversations with the defendant and had no bearing on his ability to recount those conversations in court.

At trial, immediately before the State was to present the testimony of Walter "Pete" Hartman, Benn's attorneys moved to continue the trial in order to obtain a psychological evaluation of Benn. They submitted that Benn was incompetent to proceed because Benn had directed the defense not to call family members in the guilt or penalty phase, based on an unsubstantiated belief that family members' lives had been threatened. The court requested evaluations of the defendant from three psychologists: Dr. Carl Reddick, Dr. Lloyd Cripe, and Dr. Brett Trowbridge.

Dr. Reddick found no indication of a mental disease or defect and thus no evidence of incompetence to stand trial under RCW 10.77.050. Dr. Reddick was of the opinion that Benn was malingering and that Benn had been untruthful, vague, hesitant, and evasive during his evaluation. Dr. Reddick stated that such behavior is not typical of the mentally ill, but is

typical of those attempting to avoid responsibility. While Benn claimed to be hearing voices, Dr. Reddick opined that Benn was inconsistent and hesitant when Dr. Reddick attempted to elicit specifics and gave answers which were not consistent with clinical observations of those who suffered from a delusion. While Benn was understandably depressed, Dr. Reddick indicated that condition would not have an effect on his competence to stand trial.

Dr. Cripe was of the opinion that Benn was not competent to proceed. Dr. Cripe found that Benn suffered from a delusion that "Pete" would harm his family if Benn testified and that delusion would interfere with his assisting counsel. However, on cross examination, Dr. Cripe indicated he did not know the legal definition of competency to stand trial. Dr. Cripe also knew few facts of the case.

Dr. Trowbridge was of the opinion that Benn was competent to proceed with the remainder of the guilt phase but was not competent to proceed to the penalty phase. He agreed

with Dr. Cripe that Benn's belief that "Pete" would kill his family if he or they testified was a genuine delusion, but he disagreed with Dr. Cripe's conclusion that it was an isolated delusion which would not render Benn incompetent to stand trial. Dr. Trowbridge's opinion was that Benn might be incompetent for the penalty phase because his delusion might prevent him from making an allocution at the penalty phase, which would very likely affect the outcome of the penalty phase. Conversely, regarding the guilt phase, Dr. Trowbridge felt that a delusion-prompted decision not to testify in his defense in the guilt phase would not affect the outcome in that phase. He therefore felt that Benn's delusions did not overwhelm his competence to proceed with the guilt phase.

The court determined that Benn was malingering, as suggested by Dr. Reddick, and that he was competent. The court therefore denied the motion to continue the trial. (The defense presented the court with another motion to the same effect at the beginning of the penalty phase. Without taking

further testimony from the experts, the court denied that motion.)

The jury returned a verdict of guilty on both count 1 and count 2, finding that Benn had committed first degree murder accompanied by an aggravating circumstance: multiple victims killed as part of a common scheme or plan.

At the outset of the penalty phase, Benn moved to represent himself. This motion was prompted by his conflict with counsel -- Benn insisted that no case be presented in mitigation and defense counsel intended to present mitigation in spite of Benn's wishes. The motion was granted, and defense counsel Raymond Thoenig was appointed to act as standby counsel. When Benn subsequently decided he was incapable of proceeding without counsel, Mr. Thoenig told the court he was prepared to produce his witnesses and did proceed after a 20-minute continuance.

The mitigation presented was evidence of the defendant's good character and the impact his execution might

have on his family. This was the same information and argument that was presented by Benn's attorneys prior to the filing of notice under RCW 10.95.040(1). Benn was provided an allocution opportunity and spoke to the jury.

At the end of the penalty phase, the jury found there were not sufficient mitigating circumstances to merit leniency. Pursuant to RCW 10.95.030(2), Benn was sentenced to death.

The trial court, pursuant to RCW 10.95.120, filed with this court on July 23, 1990 its report on the defendant's conviction for aggravated first degree murder for use in this court's statutorily mandated comparative proportionality review of Benn's sentence.

STANDARD OF REVIEW

Benn challenges both his conviction and his sentence based on a number of claimed constitutional and procedural errors. We review assignments of guilt phase error in capital cases no differently than in noncapital cases. State v. Lord, 117 Wn.2d 829, 849, 822 P.2d 177 (1991). However, claims of

error associated with the sentencing phase of a capital case are given heightened scrutiny. Lord, at 888. Since the death penalty is qualitatively different from all other punishments, it is all the more important that there be reliability in any determination that death is appropriate punishment in a given case. Lord, at 888. However, while heightened scrutiny means a closer, more careful review of the record, it does not entail a raised standard of review. Lord, at 888. While this court may look more closely at the record in a capital case to determine whether the trial court met an applicable standard of review, e.g., abuse of discretion, we do not subject the trial court's actions to a higher standard of review because the context is a capital case.

Each issue raised by Benn is separately discussed in the following analysis section.

ANALYSIS

GUILT PHASE ISSUES

Admission of Testimony of Roy Patrick

Benn contends the trial court erred in allowing the State to present the testimony of witness Roy Patrick. Benn submits that his conviction should be reversed because the State failed to produce material information to the defense in response to a general request under Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). Benn argues that information about the search warrant and the affidavit of a confidential informant regarding Roy Patrick's alleged drug activity from his motel room was improperly withheld by the prosecution. Benn argues due process was violated by this omission and that reversal of his conviction is the required remedy.

The State submits this case should be reviewed under United States v. Agurs, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S.

Ct. 2392 (1976), which, the State argues, provides the applicable standard of "materiality" in this context. Also offered by the State is State v. Laureano, 101 Wn.2d 745, 682 P.2d 889 (1984), in which this court summarized three possible suppression situations and addressed the Agurs standards to be applied to them:

> In United States v. Agurs, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976), the Supreme Court applied the Brady rule to three distinct suppression situations. First, where prosecutorial misconduct is involved, a conviction "must be set aside if there is any 'reasonable likelihood'" that the undisclosed testimony could have affected the jury's decision. Agurs, 427 U.S. at 103. Second, if the defense has made a pretrial request for specific evidence, the test focuses on whether "the suppressed evidence might have affected the outcome". Agurs, 427 U.S. at 104. Third, where a general Brady request has been made or no request has been made at all, the duty to disclose evidence arises only if the "evidence creates a reasonable doubt that did not otherwise exist". Agurs, 427 U.S. at 112.

State v. Laureano, 101 Wn.2d at 759.

Neither party in this appeal has addressed the case of United States v. Bagley, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985), which revised the Agurs rule for determining

the materiality of information in nondisclosure situations. In Bagley, the Supreme Court held that evidence withheld by the government is "material" (such that its nondisclosure would require reversal of a defendant's conviction) only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, at 682. A "reasonable probability", the Court explained, "is a probability sufficient to undermine confidence in the outcome." Bagley, at 682.

The Court in Bagley held that this formulation was "sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused". Bagley, at 682.

We accordingly apply Bagley to this case: "[i]mpeachment evidence . . . as well as exculpatory evidence, falls within the Brady rule." Bagley, at 676 (citing Giglio v. United States, 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct.

763 (1972)). The Bagley opinion provides the following additional guidance:

> The constitutional error . . . in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination. As discussed above, such suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with "our overriding concern with the justice of the finding of guilt," United States v. Agurs, 427 U. S., at 112, a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.

(Italics ours.) Bagley, at 678. In reviewing prosecutorial conduct pursuant to this standard, Bagley further states:

> The Brady rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial[.]

(Footnotes omitted.) Bagley, at 675.

Applying the Bagley rule to Benn's case, we conclude that the State's nondisclosure of the information regarding Roy

Patrick does not warrant reversal. The information Benn claims the State withheld was not both favorable to the accused and material to determining guilt or punishment. See Bagley, at 674. The defense already had been informed that Patrick was benefiting from his testimony against Benn by virtue of his arrangement with the police. The subsequent search of Patrick's motel room does not indicate anything further regarding Patrick's motives for testifying than was already known by the defense and revealed no criminal conduct. There exists no reasonable probability that, had this evidence been disclosed to the defense, the results of Benn's trial would have been different.

We accordingly reject this assignment of error.

Cross Examination of State's Witness Patrick

Benn contends the trial court unduly restricted the defense's ability to crossexamine state witness Roy Patrick. He assigns error to the trial court's rulings that Patrick's alleged drug-related activities were collateral and thus beyond the

scope of cross examination. Benn argues he was denied his right to confront all witnesses due to being precluded from "full cross examination" of Patrick.

We disagree. When the defense became aware of the warrant search of Patrick's room and requested information on this matter, it was provided. When the defense then asked to interview the confidential informant, the judge held an in camera interview with the informant and the investigating officer and relayed to the defense the information acquired in these interviews. Defense counsel was nevertheless able to crossexamine Patrick regarding his motive to testify and his possible bias in favor of the State. Trial courts have discretion to determine the scope of cross examination and to prohibit further questioning where the claimed bias is speculative or remote. State v. Young, 89 Wn.2d 613, 628, 574 P.2d 1171, cert. denied, 439 U.S. 870 (1978); State v. Guizzotti, 60 Wn. App. 289, 293, 803 P.2d 808, (1991); see also Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974). Roy

Patrick had already negotiated and agreed to testify against Benn in exchange for 6 months off the sentence he was serving when he encountered Benn. At the time of the alleged drug-dealing incident, the defense was allowed thorough cross examination on the subject of his deal. The allegations of Patrick's drug dealing were not relevant to his credibility as a witness under ER 608(b), as the activities alleged by the informant took place after Patrick's deal and did not impact Patrick's ability to relate his discussions with Benn on the witness stand. The trial court did not abuse its discretion limiting Benn's cross examination of Patrick on allegations of drug dealing.

Nor did the trial court err in refusing to allow the defense to call the confidential informant to the witness stand to rebut Patrick's denial of drug dealing. The court was within its discretion in ruling such testimony would not have been relevant to Patrick's credibility regarding his jailhouse conversations with Benn. Moreover, ER 608(b) expressly

prohibits an attack on witness credibility through resort to extrinsic evidence for proof of specific instances of witness conduct:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(Italics ours.) Since the trial court was well within its discretion in ruling the matter irrelevant, we leave undisturbed its decision on the defense's request to impeach Patrick.

Evidence of Victims' Involvement With Benn in Insurance Fraud

Benn argues the trial court erred under ER 404(b) in allowing the State to present evidence of his prior bad acts. ER 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for

> other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(Italics ours.) Benn contends the State should have been barred from introducing evidence of his involvement in insurance fraud with the murder victims through the planned burglary and arson of his trailer residence. The defendant asserts first there was insufficient proof of these allegations; and second, that it was unduly prejudicial and irrelevant.

The State offered evidence of Benn's involvement in the arson of his trailer and of fraudulent insurance claims in order to show that Benn arranged with Dethlefsen to share the proceeds of fraud. A quarrel between the two over proceeds was argued by the State to be a motive for the murders, and proof of motive is a proper basis for the admission of prior bad acts evidence under ER 404(b). A prior bad act offered under ER 404(b) must be proved to the court by a preponderance of the evidence. State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981). The trial court's preliminary finding will be upheld if it

is supported by substantial evidence. Tharp, at 594. We hold substantial evidence supported the trial court's finding that Benn had been involved in an insurance fraud scheme with the murder victims.

The State offered as evidence of motive Benn's involvement in insurance fraud with the victims through the testimony of Patrick:

> Q Okay. Did he indicate to you why he had killed Jack Dethlefsen and Mike Nelson?
>
> A Apparently he had had his brother, Jack, and Mike do a couple of things for him. One of them was, I guess, to burn his trailer to collect some insurance money which they were supposed to get half or a portion of the money. Well, he didn't pay them. Instead of paying them the money, he invested it in a trailer park. As he put it to me -- I said, "That's right, you should pay your partners." He says, "Well it is for their own good." He said, "I invested the money in a trailer park and it is not making any money right now but when it does it is an investment for them." And then apparently he had them do a burglary for him which, again, he didn't pay them, he turned around [and] bought a . . . Cadillac.

Report of Proceedings, at 1233.

The State also presented evidence that Benn admitted using insurance proceeds to buy a trailer park and making an

excessive insurance claim. Additionally, Monte Benn testified that Benn removed or duplicated valuables such as photos and fishing equipment from the trailer prior to the fire, and some of the items Benn claimed as lost turned up after the fire. There was substantial evidence for the trial court to have determined that prior bad acts could be admitted under ER 404(b), as this related to Benn's motive.

Furthermore, the probative/prejudicial ruling of the trial court under ER 403[1] will be reversed only if there has been a manifest abuse of discretion. State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984). There was no such abuse here. The insurance fraud scheme was clearly relevant to prove Benn's motive for the murders (to silence Dethlefsen and Nelson who

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[1] ER 403 states:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

were pressing Benn for money), and no unfair prejudice resulted from admission of this evidence.

Finally on this issue, we note that Benn's reliance on State v. Hieb, 39 Wn. App. 273, 693 P.2d 145 (1984) is misplaced. That decision was reversed by this court in State v. Hieb, 107 Wn.2d 97, 727 P.2d 239 (1986).

Jury Instructions

Benn contends the jury was not properly instructed in the applicable law at the end of the guilt phase of his trial. He argues that the trial court's failure to give defendant's requested instructions 7, 8, 9, 11, 12, 19, 24, 25, 32, 33, 34, 36, 37, 42, 43, 44, 45, 46, 49 and 50 "rendered it impossible for the defense to adequately argue [the defendant's] theory of the case to the jury." Brief of Appellant, at 147. The State argues that all these rejected instructions were either unsupported by the facts, by the law, or were cumulative or misstated the law. We agree with the State's characterization of the rejected instructions.

Each side in a case may have instructions embodying its theory of the case if there is evidence to support that theory; it is error to give an instruction which is not supported by the evidence. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). An instruction must state the applicable law correctly. State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). Each instruction must be evaluated in the context of the instructions as a whole. State v. Coe, supra at 788. It is not error to refuse to give a cumulative instruction or one collateral to or repetitious of instructions already given. State v. Hawkins, 70 Wn.2d 697, 708-09, 425 P.2d 390 (1967).

In light of these principles, we review Benn's challenges to the trial court's rulings regarding jury instructions in the guilt phase of his trial.

Benn argues that defense instructions 7 and 8 were necessary to instruct the jury that it was not to draw inferences from inferences nor base its verdict upon speculation. Defendant's proposed instruction 7 stated:

> In considering the evidence in this case, you are instructed that you may draw inferences from such facts as are proven. You may not draw inferences from other inferences.
>
> What is meant by the statement that an inference cannot be based upon another inference is that an inference cannot be based upon evidence which is uncertain or speculative or which raises merely a conjecture or possibility.

Benn's proposed instruction 8 stated:

> You may not base your verdict upon mere theory or speculation. If there is nothing more reasonable to proceed upon than two or more equally reasonable inferences from a set of facts, and under only one of the inferences would the defendant be guilty, you should adopt that which admits innocence and find the defendant not guilty.

The principle stated in these proposed instructions was adequately covered by the trial court's instruction 1, which stated in pertinent part: "Your deliberations must be based upon the evidence, and not upon speculation, guess or conjecture." The jury was adequately advised not to speculate in reaching its decision and to base it on the evidence.

Benn also challenges the refusal of the trial court to give defendant's proposed instruction 9, which stated:

> If the evidence which you have heard is susceptible of two constructions, each of which

> appears to be reasonable and only one of which points to the guilt of the defendant, it is your duty to adopt the interpretation which will admit that the defendant is innocent and reject that which points to his guilt.

This instruction was properly rejected as it misstated the law. State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975) (rejecting the use of the so-called "multiple hypothesis" instruction).

Benn next argues that his proposed instructions 11 and 12 were necessary to assist the jury in evaluating his own "alleged statements against penal interest".[2] Instructions 11 and

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[2] Benn's proposed instruction 11 stated:

"The State has offered and the Court has received evidence of a statement the State claims was made by the defendant.

"Before you may consider any statement made by the defendant as evidence against him/her, you must find that the statement was made by the defendant and that it was made voluntarily. A voluntary statement is a knowing, intelligent statement, made with knowledge of the possible consequences of the statement, that is obtained without the use of abuse, force, threats, coercion, inducement of promise, or by any other means which would make such statement unworthy of belief.

"In considering whether any statement or part of it is voluntary, you should consider: One, the external circumstances -- that is, the physical facts surrounding the defendant at the time the statement was made; and second, the internal circumstances -- that is, the defendant's psychological response to the surrounding physical facts.

"In considering the defendant's surroundings at the time the statement was made, you should consider the conduct and the statements of others in his/her presence, the length of the questioning and his/her physical surroundings, if you find these had influence on his/her making a statement.

"In considering the defendant's psychological response to his/her surroundings, you should consider the defendant's age, education, experience, character, intelligence, previous training, mental qualities, and mental capacity at the time of making the statement. You should also

12 essentially handed to the jury the determination of whether alleged statements of Benn's offered into evidence were voluntary, and directed the jury not to consider at all any statements the jury found involuntary. Both of these instructions misstated applicable law. Benn's own statements were non-hearsay statements of a party under ER 801(d)(2);

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consider his/her physical and mental condition and his/her susceptibility to any improper influence and to any other factor which bears upon the voluntariness of his/her statement. And, you should also consider the nature, content and import of the statement itself.

"If any statement against interest was obtained from the defendant by abuse, force, threats, coercion, inducement of promises, or while the defendant was under the influence of fear of physical punishment by those having him in custody or questioning him, it is not voluntary and you must reject any such statement or parts of statement so obtained.

"The burden of proving that any statement against interest made by the defendant is voluntary is upon the State. You should, however, consider as evidence in this case the whole or any part of any statement against interest made by the defendant which you find to be voluntary. You should consider it in connection with every other fact and circumstance laid before you, giving to it such weight and credibility you deem it entitled to."

Benn's proposed instruction 12 stated:

"A statement should not be given any consideration by you unless you unanimously find that the statement was voluntarily made and that the defendant in making it was first informed of his/her constitutional right to remain silent if he/she wished and that he/she was entitled to the benefit of advice from a lawyer at all times. A statement, even if admittedly true, cannot be used to prove guilt unless voluntarily made.

"A statement made under inducement may be considered by you. By inducement is meant promises to do a favor for the accused, such as for instance, not prosecuting some person for a crime. If you believe such promise was made in this case, you should scrutinize the statement with great care and caution so as to avoid any possible chance that one should be convicted on evidence of a statement which is not true."

the references in instruction 11 to statements against penal interest are therefore erroneous. Additionally, since most of Benn's statements were made to private parties, the references to advisement of rights and voluntary waiver of rights in instruction 12 was improper. See Colorado v. Connelly, 479 U.S. 157, 93 L. Ed. 2d 473, 107 S. Ct. 515 (1986). To the extent this instruction was intended to refer to Benn's custodial statements to police officers, it also misstates the law. The trial court determines the voluntariness of a confession as a matter of law; the jury may consider this question again only in determining what weight to give the statement. State v. Lanning, 5 Wn. App. 426, 487 P.2d 785 (1971). The trial court's instruction 8 adequately addressed that question:

> You may give such weight and credibility to any alleged statement by the defendant as you see fit, taking into consideration the surrounding circumstances.

Benn next argues that his proposed instructions 24 and 25 would have provided a fuller explanation of premeditation.[3]

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[3] Proposed defense instruction 24 stated:

These instructions were properly rejected as cumulative of instruction 13, which adequately stated the rule regarding premeditation.[4]

Benn next challenges the court's failure to give his proposed instructions 32, 33, 34, 36 and 37, which dealt with selfdefense and excusable homicide (accident). The instructions on excusable homicide (32 and 33) were properly rejected as there was no evidence of accident.

"Premeditation must involve more than a moment in point of time. Premeditated means thought over beforehand. It is the deliberate formation of and reflection upon the intent to take a human life and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short."

Benn's accompanying proposed instruction 25 stated:

"The mere passage of time for a killing to occur shows only an opportunity to deliberate and by itself is insufficient to sustain the premeditation element absent evidence that the defendant did in fact deliberate."

[4] Instruction 13 stated:

"A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person unless the killing is justifiable.

"Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed."

Benn's proposed instruction 34, dealing with self defense, omitted the requirement that the actor's evaluation of the situation must be reasonable. RCW 9A.16.050(1); State v. Hughes, 106 Wn.2d 176, 721 P.2d 902 (1986). Benn's proposed instruction 37 was cumulative. The court's instructions 21 and 22 properly stated the applicable rule. Instruction 21 informed the jury that justifiable homicide is a defense to a charge of murder and defined justifiable homicide. It also informed the jury that the burden was upon the State to prove that the homicide in Benn's case was nonjustifiable. Instruction 22 told the jury to consider a claim of justifiable homicide in light of the circumstances reasonably appearing to the defendant at the time.[5] These instructions adequately directed the jury regarding self defense.

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[5] Instruction 21 to the jury stated:

"It is a defense to a charge of murder that the homicide was justifiable as defined in this instruction.

"Homicide is justifiable when committed in the lawful defense of the slayer when the slayer reasonably believes that the person slain intends to inflict death or great personal injury and there is imminent danger of such harm being accomplished.

"The slayer may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they

Benn's proposed instruction 36 was a "no duty to retreat" instruction. It stated:

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

This instruction regarding no duty to retreat was unsupported by the evidence and was properly rejected. State v. Frazier, 55 Wn. App. 204, 208, 777 P.2d 27 (1989) (citing State v. Thompson, 47 Wn. App. 1, 733 P.2d 584, review denied, 108 Wn.2d 1014 (1987)). There is no evidence that anyone other than Benn was the original aggressor.

The court's instruction 21 properly stated the law and did not relieve the State of its burden of proving the absence of

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appeared to the slayer taking into consideration all of the facts and circumstances known to him at the time of and prior to the incident.

"The State has the burden of proving beyond a reasonable doubt that the homicide was nonjustifiable. The State meets this burden by proving each element of the crime charged beyond a reasonable doubt."

Instruction 22 stated:

"Necessary means that no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended, under the circumstances as they reasonably appeared to the actor at the time."

self defense. The jury was instructed that proof of the absence of justifiable homicide was achieved by the State proving each element of the crime charged beyond a reasonable doubt in instruction 21. The State correctly observes that "culpable intent and lawful use of force are opposite sides of the same coin." Brief of Respondent, at 61-62. See State v. McCullum, 98 Wn.2d 484, 495, 656 P.2d 1064 (1983).

Benn asserts, without analysis, that the court erred in refusing to give defense instructions 43, 44, 45, and 46, which would have allowed the jury to consider first and second degree manslaughter as additional lesser included offenses. These instructions were properly rejected. A lesser included offense instruction need not be given if unsupported by the evidence. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). There is no evidence the victims were killed recklessly or negligently.

Lastly, regarding guilt phase instructions, Benn argues that

> [t]he wording and complexity of the instructions was such that the average juror could not understand the true nature and content of the instruction . . . This violated the due process rights of Gary [Benn] and subjected him to a verdict based solely on the passions and prejudices of the jury.

Brief of Appellant, at 151-52.

The defendant in State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991), made a similar argument for the first time on appeal. The contention in Lord's case was based on a computer analysis using a program that scans written information to determine a reader's ease of understanding. This court noted in Lord:

> No objection was made on this basis at trial, nor was the computer program and related analysis offered for admission at trial. Thus, not only was the issue omitted below, but also it is based on evidence not contained in the record.

Lord, at 880. Thus, this court declined to reach the issue of readability as it was not based upon a "manifest error affecting a constitutional right" under RAP 2.5(a)(3). This court also observed:

> While we do not question that jury instructions in any death penalty case are complicated and lengthy, it is out of an

> abundance of caution for the defendant's rights that we are so precise. . . . Precision necessarily entails complexity. We cannot fault trial judges for failing to carefully instruct a jury, and then find error because the instructions are too complicated. The complex nature of the jury instructions is not, in and of itself, an instructional error of constitutional magnitude warranting review for the first time on appeal.

Lord, at 880-81.

In this case, Benn offers nothing but an unsupported assertion that the average juror could not understand the jury instructions in his case. For the reasons we stated in Lord, we decline to address this contention. An appellate court need not decide a contention that is not supported by citation to authority. Lord, at 853.

We hold the jury instructions Benn's jury received fully and accurately informed the jury of the law and allowed Benn to argue all theories supported by the law and the evidence.

ISSUES RELATED TO PENALTY PHASE

Claims of error associated with the sentencing phase of a capital case are given heightened scrutiny. State v. Lord, supra at 888.

Competence of the Defendant

Benn argues the trial court erred in finding him to be competent to meaningfully assist counsel in the penalty phase of trial. He does not challenge the finding of competence prior to the guilt phase. Prior to the commencement of the penalty phase, the court said:

> In any event, it's my previous finding and there is nothing that has been indicated to me to change it; that the defendant is being manipulative, and I find that he is competent.

Report of Proceedings, at 2134. The court indicated that it held the defendant to a burden of establishing incompetence by a preponderance of the evidence, and further added:

> But I wanted to state for the record just in case this matter should get to the United States Supreme Court or some other Court, Federal court or otherwise, that I am convinced by a preponderance of the evidence that the defendant is being manipulative and that he is competent to proceed with proceedings.

Report of Proceedings, at 2135.

A criminal defendant may be required to prove his incompetence. Medina v. California, ___ U.S. ___, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992). As the trial court here noted,

however, even if the State bore the burden of proving competence, Benn was shown to be competent to proceed with the penalty phase.

A defendant is competent to stand trial if he is able to appreciate the nature of the proceedings and to assist with his defense. RCW 10.77.010(6); 10.77.050. Ability to assist does not mean the defendant must be able to choose or suggest trial strategy. The trial court's determination of competence is a matter within its discretion, reversible only upon a showing of abuse of discretion. State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985), cert. denied, 476 U.S. 1144 (1986).

Benn's alleged belief that someone named "Pete" would kill his family if he testified was considered by Dr. Trowbridge to be a delusion. Even so, Dr. Trowbridge felt Benn was competent to proceed with the guilt phase of his case because Benn's decision whether to testify in the guilt phase as a trial strategy decision was of lesser consequence than his decision whether to speak in the penalty phase. Dr. Trowbridge's

opinions rested on the incorrect assumption that competence means ability to choose trial strategy. See State v. Ortiz, supra at 483; State v. Harris, 114 Wn.2d 419, 789 P.2d 60 (1990). Since Dr. Trowbridge did not analyze Benn's competence under the standards delineated by this court in Ortiz and Harris, the trial court properly rejected his conclusions. Even if all three doctors had applied the same correct legal standards, then credibility was for the trial court to determine. Dr. Reddick's evaluation, which the trial court found credible, supports the court's finding that Benn was competent, although depressed, and seeking to stall or avoid standing trial further. We accordingly uphold the trial court's determination that Benn was as competent to proceed to the penalty phase as he was to stand trial.

Ineffective Assistance of Counsel Prior to Filing

Next, Benn claims he was denied the effective assistance of counsel prior to the filing by the State of the notice to seek a special sentencing proceeding. Benn's

argument suggests that he might have avoided death penalty deliberations had his counsel pretrial provided adequate representation.

A defendant is denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct. Strickland v. Washington, 466 U.S. 668, 687-88, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). In Burger v. Kemp, 483 U.S. 776, 788-89, 97 L. Ed. 2d 638, 107 S. Ct. 3114 (1987), this standard was held applicable to death penalty proceedings. See In re Jeffries, 110 Wn.2d 326, 332, 752 P.2d 1338 (1988); Lord, at 883.

Benn's claim that his attorneys failed to investigate mitigating factors to present to the prosecutor prior to the filing of the notice of special sentencing proceeding is undermined by the testimony of former counsel, Gary Clower. It is also undermined by the fact that the same mitigation factors

presented by Mr. Clower prior to the filing of the special notice were also presented in the penalty phase proceedings by Benn's trial counsel.

In asking whether the conduct of Benn's counsel fell below the standard of reasonable conduct, the court is mindful of the following language from Strickland:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland, 466 U.S. at 689; accord, Burger v. Kemp, 483 U.S. at 789.

Even if one accepts the argument that some other mitigation evidence might have been offered to the prosecution prior to the filing of the special notice, Mr. Clower's conduct need not be viewed as falling below the

objective reasonable conduct standard. Contrary to Benn's assertion, Mr. Clower made a reasoned decision to offer only character evidence and loss to family as mitigation after conferring with Benn as to mitigation evidence. Mr. Clower testified that he did discuss the question of mitigating factors with the defendant and that it was inconsistent with the defense case as presented by Benn to Mr. Clower to seek offering other mitigation evidence. Mr. Clower testified as follows:

> Q Okay. And did you ever discuss with Mr. Benn possible mitigating circumstances between the time of arraignment and the time that the notice was filed?
>
> A Well, I'd have to say yes, I did. I was aware very early on, before charges were even filed, that it was a potential aggravated murder case. When charges were filed, of course, it became clear at that point that the death penalty was a possibility. I am aware of the types of information that are commonly brought forth at death penalty hearings, and Mr. Benn and I had quite a few conversations. I'd have to say that I spent more time with Gary Benn than I did any other client I ever had, and I spent time with various members of his family. And I think during that period I had a pretty good understanding of his background and what I believed to be the facts of the case.
>
> . . .
>
> Q And why was that?

A Well, I guess you have to look at the case that I had at the time, which is possibly a little bit different than most of the aggravated murder cases that the courts see. We had a case here where the evidence I had at the time was that my client was not there, did not commit the murders, was not at the scene. And there was no physical evidence early on. There were no blood spatters on the clothes, the type of evidence you might expect to see. That testing on the boot was not done until sometime in December, when the boot was sent up to -- I understand first it went to Seattle and then down to an expert in Oregon, I think, is the route that it took. Or it might be visa-versa [sic], but that didn't occur until December. Now, we're talking back in May, right after the arraignment. There was no evidence at the time, no physical evidence, no gunpowder, no blood. I had a client telling me that he was not there, that he was elsewhere. The statutory mitigating factors rather all speak in terms of someone who was there and who did it. At the time I had what I thought was a very defensible case, from a believable client, with no physical evidence. And under circumstances like that, you don't go to the prosecut[or] and say, well, when he did it, he did it with the consent of the victim, or that he was acting under duress, or any of the statutory factors. That was inconsistent with the case that I was presented with.

Report of Proceedings, at 259, 262-63.

In this light, the defendant's ineffective assistance argument may be said to characterize as negligent what was actually a strategic decision by trial counsel. See In re Jeffries, supra, at 332-33. There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment. Lord, at 883. "If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel." Lord, at 883. Obviously defense counsel's judgment may include wishes of the defendant:

> "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."

(Italics ours.) In re Jeffries, at 332-33 (quoting Strickland, 466 U.S. at 691)). It is now evident that Mr. Clower relied for his

approach to the case upon a dishonest version of events handed him by Benn.

Even if we assumed arguendo that Mr. Clower's conduct failed the first prong of Strickland, Benn has not satisfied the second Strickland prong by showing there was a reasonable probability of a different outcome but for Mr. Clower's decision not to present additional evidence. No additional mitigating evidence was presented at the end of the case in the penalty phase; nor does Benn demonstrate there was any additional mitigation to offer.

We hold Benn was not denied effective assistance of counsel prior to the filing of the notice to seek a special sentencing proceeding.

Ineffective Assistance During the Penalty Phase

Benn also claims he received ineffective assistance of counsel during the penalty phase of his trial.

Under Strickland, a defendant is deprived of effective assistance of counsel at trial if the attorney's conduct falls

below an objective standard of reasonable conduct and if there is a probability that the outcome would have differed but for the substandard conduct of the attorney. 466 U.S. at 687-88, 694. We apply the Strickland standard to death penalty proceedings. Burger v. Kemp, 483 U.S. at 788-89; In re Jeffries, 110 Wn.2d 326, 332, 752 P.2d 1338 (1988).

In In re Jeffries, supra, this court held that a defendant was not denied effective assistance of counsel when counsel followed the defendant's wishes and brought no mitigating evidence to the penalty phase.[6] Here, the record indicates that trial attorney Raymond Thoenig was prepared, in spite of Benn's initial wishes, to present mitigating evidence. Mr. Thoenig operated as effective standby counsel after the court initially granted Benn's motion to proceed pro se for a brief

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[6] We note that the United States Supreme Court has declined to hear arguments in a California case holding that a defendant who insists that mitigating evidence not be presented at the penalty phase of a capital case is estopped from later claiming ineffective assistance based on counsel's acquiescence in his wishes. People v. Deere, 53 Cal. 3d 705, 808 P.2d 1181, 280 Cal. Rptr. 424 (1991), cert. denied, Deere v. California, ___ U.S. ___, 117 L. Ed. 2d 122, 112 S. Ct. 954 (1992).

period in the penalty phase. Benn, therefore, cannot meet the first Strickland prong.

Nor can he satisfy the prejudice prong. As noted above, the same mitigation evidence regarding Benn's character and the effect of his loss to his family was offered during the penalty phase as was offered before the beginning of trial. Benn fails to suggest any additional mitigation evidence counsel could have offered, nor does he claim that counsel improperly presented prejudicial evidence.

Mandatory Death Sentence Contention

Benn contends the procedures of RCW 10.95 unconstitutionally impose a mandatory sentence of death. We note at this point that this argument and several to follow are raised in spite of having been previously rejected by this court. The Brief of Appellant, at 52-53, states the following:

> Many of the issues addressed in the following sections have been discussed in prior decisions of this court. Nonetheless, counsel's duty to raise all potential issues in a death penalty case requires that they be dealt with here. In addition, the doctrine of procedural forfeiture employed by the federal courts

> requires that defendant give state courts the opportunity to resolve these issues in his favor.

Accordingly, as many issues in this appeal have been squarely decided by this court on previous occasions, they are addressed when presented in this appeal by brief reference to controlling authority.

This court has repeatedly held that RCW 10.95 does not impose a mandatory sentence of death. State v. Campbell, 103 Wn.2d 1, 27-28, 691 P.2d 929 (1984); State v. Bartholomew, 101 Wn.2d 631, 647, 683 P.2d 1079 (1984); State v. Jeffries, 105 Wn.2d 398, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986); State v. Lord, 117 Wn.2d 829, 916, 822 P.2d 177 (1991). The Ninth Circuit has also rejected this challenge to our statute, Campbell v. Kincheloe, 829 F.2d 1453 (9th Cir. 1987), and the Supreme Court has rejected identical challenges to similar statutes. See Blystone v. Pennsylvania, 494 U.S. 299, 108 L. Ed. 2d 255, 110 S. Ct. 1078 (1990); Boyde v. California, 494 U.S. 370, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990).

Unconstitutional Delegation to Prosecution by Legislature

Benn argues that RCW 10.95http://www.mrsc.org/mc/rcw/rcw 10 title/rcw 10 . 95 chapter/rcw 10 . 95 chapter.htm represents an unconstitutional standardless delegation of authority to the prosecution. This court has repeatedly rejected the argument that through RCW 10.95 the Legislature has delegated authority without adequate standards to guide its exercise by the prosecution. See State v. Campbell, supra at 26; see also State v. Lord, supra at 916 (rejecting void for vagueness challenge); State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984).

Improper Charging of Defendant

Benn contends he was improperly charged by means of an information and separate notice of intent to seek a special sentencing proceeding. This court has repeatedly rejected the argument that capital defendants should be charged by

indictment rather than by information. See State v. Jeffries, supra at 424; State v. Ng, 104 Wn.2d 763, 774-75, 713 P.2d 63 (1985); see also State v. Lord, supra at 916.

Presumption of Innocence

Benn argues that RCW 10.95 violates the requirement of the presumption of a defendant's innocence. Benn argues that this court's holdings in State v. Jeffries, supra, and State v. Mak, 105 Wn.2d 692, 718 P.2d 407 (1986), that the presumption of defendant's innocence does not apply to sentence enhancement proceedings, are in conflict with the fundamental principle that a defendant enjoy the presumption of innocence. Benn argues absence of this presumption discourages leniency.

Benn also challenges the principle that it is the defendant's burden to provide mitigation evidence to the prosecution prior to a filing of a notice of a special sentencing proceeding, as such a burden vitiates the presumption of leniency.

The presumption of innocence does not apply to the penalty phase in special sentencing proceedings. This is so because these proceedings would not occur absent a jury verdict of guilt of aggravated murder. However, this dictate of logic in no way denies the presumption of leniency in the penalty phase of trial. We observe that the Supreme Court has held it constitutional to require a defendant to prove mitigating factors in a sentencing proceeding. Walton v. Arizona, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990).

In any event, Benn's jury was instructed that a presumption of leniency applies to the penalty phase, and the State acknowledges this presumption. See Jeffries, 105 Wn.2d at 425, and Mak, 105 Wn.2d at 755-56. We accordingly reject this assignment of error.

Jury Comprehension of Question Before It

Benn argues that the jury in the penalty phase of his case was incapable of answering the question before it.

The Washington death penalty statute requires the jury to answer the following question:

> Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

RCW 10.95.060(4). Benn claims the statutory language does not precisely channel jury discretion and "promotes unequal administration of law . . . as the sentencing jury cannot comprehend the question it is called upon to answer. But, See, State v. Dictado". Brief of Appellant, at 100. The defendant himself acknowledges that available authority (State v. Dictado, 102 Wn.2d 277, 687 P.2d 172 (1984)) is contrary to the proposition advanced.

This court has previously stated that the particular question which is put to the jury as mandated by statute under RCW 10.95.060(4) satisfies due process and the Eighth Amendment. See Jeffries, 105 Wn.2d at 422-23; Campbell, 103 Wn.2d at 28; Bartholomew, 101 Wn.2d at 647; and Rupe, 101 Wn.2d at 709.

Instruction Error

Benn argues the instructions in the penalty phase in his case precluded consideration of mitigating factors.

This court has repeatedly rejected the contention that because the jury does not make separate findings on each mitigating factor, meaningful appellate review is frustrated. See State v. Jeffries, supra at 426-27; State v. Lord, supra at 915-16. The Supreme Court has held that juries need not make findings of fact regarding aggravating or mitigating circumstances either considered or found. Hildwin v. Florida, 490 U.S. 638, 104 L. Ed. 2d 728, 109 S. Ct. 2055 (1989); Clemons v. Mississippi, 494 U.S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441 (1990). Furthermore, the Supreme Court has held that jurors cannot be required to agree unanimously as to any particular mitigating factor and, rather, must be allowed to make an evaluation as individuals in this regard. Mills v. Maryland, 486 U.S. 367, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988); McKoy v. North Carolina, 494 U.S. 433, 108 L. Ed. 2d

369, 110 S. Ct. 1227 (1990). The requirement of unanimous finding as to the presence of mitigating factors would impermissibly limit the jury's consideration of mitigating evidence in violation of the Eighth Amendment. McKoy, 494 U.S. at 438-39.

Legislative Encroachment on the Executive

Benn argues that Washington's death penalty statute constitutes an encroachment by the Legislature on the power of the executive.

The defendant attacks the Legislature's authority to prescribe sentencing procedures under RCW 10.95. This authority is legitimately exercised as part of the Legislature's constitutional duty to provide adequate guidelines for the exercise of prosecutorial discretion in death penalty cases. Standard setting of this type is required of the Legislature. See State v. Bartholomew, 104 Wn.2d 844, 849, 710 P.2d 196 (1985).

The exercise by the Legislature of legitimate authority to prescribe sentencing procedures in death penalty cases, coupled with its responsibility to provide adequate standards to guide the exercise of a prosecutor's discretion, is not an encroachment on the executive branch.

The limited powers of the executive in sentencing are a delegation from the Legislature. The power of the Legislature over sentencing is plenary; the fixing of legal punishments for criminal offenses is part of "the acknowledged power of the legislature to provide a minimum and maximum term within which the trial court may exercise its discretion in fixing sentence". State v. Le Pitre, 54 Wash. 166, 169, 103 P. 27 (1909). See State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).

This court has specifically recognized that the Legislature's power to set sentence parameters under RCW 10.95 entails the power to prescribe sentencing procedures. See State v. Jeffries, 105 Wn.2d at 424. To argue otherwise flies in the

face of the inherently (and wisely) limited authority of the prosecution in the death sentence context:

> [T]he prosecutor participates in the sentencing process by choosing to request a special sentencing proceeding. But the prosecutor can neither impose the sentence nor require that it be imposed. . . . [T]he prosecutor's discretion in this regard is similar to his discretion in charging a crime: "The prosecutor does not determine the sentence; the prosecutor merely determines whether sufficient evidence exists to take the issue of mitigation to the jury." Dictado, at 298. The sentencing jury or the judge determines whether the statutory conditions to impose the death penalty are met. RCW 10.95.050(2), .060(4), .080. Moreover, automatic review by the Supreme Court again insures that sentencing remains a judicial function.

(Citation omitted; italics ours.) State v. Campbell, 103 Wn.2d at 26.

Benn finds fault in RCW 10.95.050(1), which bars the prosecution from consenting to a plea, making an admission, or entering into any agreement abrogating the requirement that a special sentencing proceeding be held. The powers of the executive in sentencing are delegated by the Legislature. The Legislature has determined that once a special sentencing

notice has been filed, and the defendant has been found guilty of aggravated murder, the question of whether mitigation is sufficient to merit leniency remains with the judiciary. This distribution of authority does not violate the separation of powers doctrine. The Legislature is constitutionally required to set guidelines and limits on the exercise of discretion by the prosecution in this regard. State v. Bartholomew, 104 Wn.2d 844, 848-49, 710 P.2d 196 (1985):

> To allow the prosecution [unfettered] discretion in a death penalty case absent specific statutory guidance could also give an unconstitutional delegation of authority to the prosecutor. . . . The "discretion" the prosecutor possesses at the charging stage is narrowly focused. The prosecutor can only follow the statutory instructions.

In Bartholomew, at 850, we concluded:

> The prosecution has no right, statutory or constitutional, to usurp the jury's functions to determine mitigation in this case, and make the decision whether the defendant should live or die. The prosecutor does have the right to appear before the jury and ask for mitigation and the sparing of defendant's life. The final decision, however, will rest with the jury, subject to review by this court.

We reject Benn's argument of legislative encroachment on prosecutorial discretion as that discretion is bordered by the necessary limits of the legislative and judicial provinces.[7]

Legislative Encroachment Upon Judiciary

Benn argues that Washington's death penalty statute constitutes an encroachment by the Legislature upon the powers of the judiciary.

This court has previously rejected this contention. See State v. Jeffries, 105 Wn.2d 398, 424, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986); see also State v. Lord, 117 Wn.2d 829, 915-16, 822 P.2d 177 (1991).

Equal Protection

Benn argues that Title 10.95 RCW violates equal protection.

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[7] We hold that in Benn's case the prosecution did offer to request the court to withdraw the special sentencing notice before trial in exchange for Benn's plea of guilty to two counts of aggravated first degree murder. Benn's attorneys rejected this offer and instead offered a plea to two counts of first degree murder which was not accepted.

This court has repeatedly rejected the contention that the prosecution has an unconstitutional latitude in deciding whether to seek the death penalty under RCW 10.95. See State v. Harris, 106 Wn.2d 784, 793-94, 725 P.2d 975 (1986); State v. Dictado, 102 Wn.2d 277, 297-98, 687 P.2d 172 (1984); State v. Campbell, 103 Wn.2d 1, 25, 691 P.2d 929 (1984); State v. Rupe, 101 Wn.2d 664, 699, 683 P.2d 571 (1984); see also State v. Lord, supra at 915-16.

The reliance by the defendant on State v. Zornes, 78 Wn.2d 9, 475 P.2d 109 (1970), is misplaced. Zornes is no longer the law. See Kennewick v. Fountain, 116 Wn.2d 189, 802 P.2d 1371 (1991) (citing United States v. Batchelder, 442 U.S. 114, 60 L. Ed. 2d 755, 99 S. Ct. 2198 (1979)).

Double Jeopardy

Benn argues that Title 10.95 RCW violates the prohibition against double jeopardy.

Benn asserts that the imposition of the death penalty in cases of aggravated murder violates the prohibition against

double jeopardy since the penalty for such an offense has already been enhanced to life imprisonment without parole. This argument is without merit. The death penalty statute does not impose multiple punishments for the same offense. It does authorize enhancement of the punishment for aggravated first degree murder based on proof of additional facts (insufficient mitigating circumstances to merit leniency). Double jeopardy is not violated by further sentence enhancement upon an additional finding of insufficient mitigating factors. Missouri v. Hunter, 459 U.S. 359, 74 L. Ed. 2d 535, 103 S. Ct. 673 (1983).

Inadequate Definition of Instruction Terms

Benn argues for the first time on appeal that key terms in the jury instructions were not adequately defined. The terms in question include "common scheme or plan", "single act", and "leniency". The defendant argues the definitions provided for these terms are void for vagueness.

In State v. Fowler, 114 Wn.2d 59, 785 P.2d 808 (1990), however, this court rejected the defendant's assertion for the

first time on appeal that the term "unlawful force" as defined by the trial court's jury instructions was unconstitutionally vague or overbroad. While the defendant in Fowler argued he could raise a vagueness or overbreadth objection to a jury instruction for the first time on appeal, since the error alleged was of constitutional magnitude this court rejected this argument, relying on State v. Scott, 110 Wn.2d 682, 689, 757 P.2d 492 (1988). Fowler states that under Scott, the constitution only requires trial courts to instruct the jury as to each element of an offense charged, and thus an insufficient definition of an instruction is not an issue of constitutional magnitude which may be raised for the first time on appeal:

> Fowler argues in the alternative that he can raise a vagueness or overbreadth objection to the instruction for the first time on appeal since such error is of constitutional magnitude. However, in State v. Scott, 110 Wn.2d 682, 689, 757 P.2d 492 (1988), this court held the constitution only requires the jury be instructed as to each element of the offense charged, and the failure of the trial court to further define one of those elements is not within the ambit of the constitutional rule. Since the trial court did instruct the jury as to each element of second degree assault, it met its constitutionally

> mandated requirement. Fowler has not raised an issue of constitutional magnitude to this court.

Fowler, at 69-70. See also Lord, at 894-95 (rejecting claim not of constitutional magnitude).

Even if this court were to consider this issue, we have previously rejected this argument as applied to the term "common scheme or plan". See State v. Jeffries, 105 Wn.2d at 420:

> Defendant also claims that the phrase "common scheme or plan" also should have been defined. In instruction 7 the jury was simply told to decide whether there was a scheme or plan involved; such a simplistic request needs no definition. No error was committed.

The same reasoning applies as well to "leniency" and "single act". See Harris, 106 Wn.2d at 793; Campbell, 103 Wn.2d at 28; Bartholomew, 101 Wn.2d at 647 ("mitigating circumstances" does not require specific definition).

Benn relies on Maynard v. Cartwright, 486 U.S. 356, 361, 100 L. Ed. 2d 372, 108 S. Ct. 1853 (1988), and Godfrey v. Georgia, 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980), in support of his contention that the complained of

terms fail to channel jury discretion. Maynard and Godfrey are inapposite. In Maynard, the offending words were "especially heinous, atrocious or cruel". In Godfrey, the offending words were "outrageously or wantonly vile, horrible and inhuman". These are inflammatory, subjective, descriptive terms regarding acts of defendants. The vagueness danger in such terms is evident -- jury discretion is set rampant by such language.

By contrast, the term "single act" is neither emotionally charged nor prone to subjective standards. The term "leniency" could hardly be clearer to the jurors in guiding their discretion. In the context of the question the jurors were asked, "leniency" simply means a sentence other than death, which the jurors were told would be life without parole.

Right To Remain Silent

Benn argues that the State violated his right to remain silent during the penalty phase of trial.

While exercising his right of allocution, Benn began telling his version of what had happened leading up to the murders on February 10, 1988. The State objected:

> Your honor, the State's going to object at this time. This is not proper allocution. If the defendant wishes to give testimony, he may be sworn and take the stand, but he far exceeded the requirements and purpose of allocution.

Report of Proceedings, at 2281-282.

Benn argues that this remark improperly commented on his silence during the guilt phase in violation of the Fifth Amendment. As a preliminary matter, it should be noted that the court overruled the State's objection and allowed the defendant to continue in his own manner.

Moreover, the prosecutor's remark was not a comment on Benn's silence during the guilt phase but rather on the fact that Benn was then beginning to testify as to what "really" happened. This was an appropriate comment. Allocution is a defendant's personal plea for mercy. If the defendant instead offers a version of the facts or disputes evidence, the defendant is offering testimony, not making a plea for mercy. Lord, at

897. It is entirely correct for the prosecution to object to a defendant's violation of the proper bounds of allocution. See Lord, 117 Wn.2d at 946 (Utter, J., dissenting). But even if the prosecution in Benn's case did, in effect, comment on Benn's guilt phase silence, this did not violate his constitutional rights. Jeffries, 105 Wn.2d at 415-16.

Prejudicial Closing Argument

Benn argues the prosecutor's closing argument in the penalty phase was improper and prejudicial.

The defendant bears the burden of establishing not only the impropriety of the prosecutor's remarks, but also a substantial likelihood that those remarks affected the verdict. Mak, 105 Wn.2d at 726. Benn has not met these burdens with respect to any of the challenged comments.

First, the prosecutor's reference to all jurors and attorneys as "officers of the court" merely charged the jurors not to be guided by emotion. This was proper. In re Rupe, 115 Wn.2d 379, 390, 798 P.2d 780 (1990).

Next, the prosecutor did not argue that the jury could not consider nonstatutory mitigating factors in reaching its verdict. The prosecutor argued only that Benn's family's love for him was not sufficient to merit leniency in view of the nature of Benn's crimes. The prosecutor's reference to the joint involvement of the defendant and victims in insurance fraud was based on properly admitted evidence and was not calculated to arouse the passions of the jury.

The trial court sustained Benn's objection to the prosecutor's reference to the 1962 or 1963 yearbook pictures of the victims, and the jury was instructed not to consider this statement. The remark was not prejudicial in any event. The prosecutor was merely responding to the defense's use of a 1964 yearbook, in which Benn's picture also appeared, to show that the victims and defendant were familiar with each other.

In sum, the remarks Benn challenges either were not improper or were stricken.

Sufficiency of Aggravation Evidence To Rebut Mitigation

Benn claims there is insufficient evidence to support the jury's finding that there are not sufficient mitigating circumstances to merit leniency.

This issue stems from the first question of a 3-question inquiry this court must complete as part of its statutorily mandated review of all death sentences:

> (a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4); and
> (b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant . . . and
> (c) Whether the sentence of death was brought about through passion or prejudice.

RCW 10.95.130(2).

Under the sufficiency of the evidence analysis required under subsection (a), this court must determine if:

> "'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found sufficient evidence to justify this affirmative finding beyond a reasonable doubt.'" State v. Rupe, 108 Wn.2d 734, 765, 743 P.2d 210 (1987) (quoting State v. Mak, 105 Wn.2d 692, 761, 718 P.2d 407, cert. denied, 107 S. Ct. 599 (1986)).

State v. Rice, 110 Wn.2d 577, 623, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989).

This court applied this standard in State v. Lord, 117 Wn.2d 829, at 905-07, in independently considering mitigating and aggravating circumstances. Mitigating circumstances considered in Lord's case were the love of family and friends who would visit the defendant in prison, the defendant's age (26) at the time of sentencing, his talent as a carpenter, the lack of family support in helping Lord understand an earlier homicide conviction, the observations offered that Lord would do well in a structured prison environment, impossibility of release from a life without parole sentence, head injuries from an auto accident prior to the commission of aggravated murder, and an antisocial personality disorder. This court held:

> Viewed in the context of the totality of the evidence, these mitigating circumstances are relatively unpersuasive. "[T]he mere presence of mitigating factors does not require a jury to grant leniency, so long as it is convinced beyond a reasonable doubt that any mitigating factors are outweighed by the circumstances of the crime." Rice, at 624. Here, there was sufficient evidence to warrant the jury's decision.

Lord, at 906. The aggravating factors which outweighed mitigation evidence in Lord's case were rape and brutality of the murder of the 16-year-old victim and Lord's two prior convictions of violent crimes: second degree murder and unlawful imprisonment through menace. The defendant's lack of remorse was also noted.

Benn offered very little evidence relating to the statutory mitigating factors. He did, however, present evidence of his previous good character, the affection of family members, and the loss to his loved ones if he were sentenced to death.

On the other side of the equation, the only aggravating factor in Benn's case is multiple victims.

Comparing Benn's case to Lord's, there were more aggravating circumstances in Lord than here; but Lord also presented more mitigating evidence than Benn. As has previously been indicated, from the pretrial stage Benn's attorney decided to limit the presentation of mitigation, initially

as a matter of trial strategy. Nevertheless, Benn has not demonstrated that other significant mitigating evidence remains unpresented. Based on the evidence presented, a rational trier of fact could find that there were insufficient mitigating circumstances to merit leniency for the premeditated executions of two men. The jury's finding on this issue will not, therefore, be disturbed. State v. Rice, supra at 623.

Proportionality Review

Benn argues the imposition of the death penalty in his case was not proportional as required under RCW 10.95.130.

RCW 10.95.130(2)(b) requires this court to determine:

> Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120. . . .

Under RCW 10.95.120, trial courts must file with this court reports "[i]n all cases in which a person is convicted of

aggravated first degree murder". The pool of "similar cases" includes those cases in which the death penalty was sought and those in which it was not. State v. Lord, 117 Wn.2d 829, 907, 822 P.2d 177 (1991). In Lord, this court traced the development of proportionality review in Washington, adopted as a response to Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972). Furman prohibits imposition of death sentences by procedures which create a substantial risk that death will be imposed in an arbitrary and capricious manner. Lord, at 908 (citing Gregg v. Georgia, 428 U.S. 153, 188, 49 L. Ed. 2d 859, 96 S. Ct. 2909, reh'g denied, 429 U.S. 875 (1976)). Although proportionality review is not constitutionally required, it provides a safeguard against arbitrarily imposed death sentences. Lord, at 908 (citing Lewis v. Jeffers, 497 U.S. 764, 111 L. Ed. 2d 606, 622, 110 S. Ct. 3092 (1990)).

In State v. Harris, 106 Wn.2d 784, 725 P.2d 975 (1986), this court adopted the following test for the difficult determination of whether a death sentence is proportionate:

> [T]his court is not required to determine that less than a death sentence was never imposed in a case with some similar characteristics. On the contrary, we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally and not "wantonly and freakishly imposed," . . .

Harris, at 798 (quoting Moore v. State, 233 Ga. 861, 864, 213 S.E.2d 829 (1975)).

It has been noted in commentary that the statutorily mandated proportionality review involves a paradox. See Comment, Washington's Comparative Proportionality Review: Toward Effective Appellate Review of Death Penalty Cases Under the Washington State Constitution, 64 Wash. L. Rev. 111, 121 (1989). This court is directed to determine whether the death sentence in a particular case is proportional to sentences imposed in "similar" cases. But this review process often involves "the comparison of incomparables" as some acts

of murder are qualitatively distinct or unique. See 64 Wash. L. Rev. at 121.

In Lord, this court stated its concern in proportionality review is in avoiding two systemic problems in death sentencing: first, random arbitrariness; and second, death sentences based on the race of the defendant. Lord, at 909. In comparing "similar" cases, the Lord analysis rejected an approach to proportionality review involving a test for a matching number of identity points: "Crimes . . . are unique and cannot be matched up like so many points on a graph." Lord, at 910. Instead this court analogized the proportionality review to a search for family resemblances, a more impressionistic approach:

> Our review is not intended to ensure that there can be no variation on a case-by-case basis, nor to guarantee that the death penalty is always imposed in superficially similar circumstances. As we explained in a prior case:
>
> > Simply comparing numbers of victims or other aggravating factors may superficially make two cases appear similar, where in fact there are mitigating circumstances in one case to

> explain either a jury's verdict not to impose the death penalty or a prosecutor's decision not to seek it.
>
> In re Jeffries, supra at 490. Requiring precise uniformity would not only be unworkable, it would effectively eliminate the death penalty. Indeed, the jury is directed to tailor its decision to the individual circumstances of the crime. A jury could decline to impose the death penalty because a particular defendant deserves mercy. However, the decision to afford one defendant mercy, and yet not another, does not violate the constitution.

Lord, at 910. In arriving at the conclusion that Lord's death sentence was not disproportionate or excessive, we considered the nature of Lord's crime, the aggravating factors, and Lord's prior convictions and personal history.

We compare Benn's case (the nature of his crime and aggravating factor, his prior convictions and personal history) to the pool of similar cases required by RCW 10.95.120.

We first consider the crime of which Benn was convicted. Benn, at age 42, murdered two adult males, Jack Dethlefsen, aged 46, and Mike Nelson, aged 45. It is an unfortunate reality that many of the cases reporting aggravated first degree murder convictions since 1965 involved two or

more victims. Historically, in conducting the statutory proportionality review, this court has compared each case to others in which the same aggravating factor was proven. See State v. Jeffries, 105 Wn.2d 398, 430, 717 P.2d 722 (1986); State v. Harris, 106 Wn.2d 784, 798-99, 725 P.2d 975 (1986); State v. Rupe, 108 Wn.2d 734, 768-69, 743 P.2d 210 (1987); State v. Rice, 110 Wn.2d 577, 626, 757 P.2d 889 (1988). Lord adopts a somewhat broader approach. Lord, at 910-11. In order to identify the cases which most resemble Benn's, we present summaries from reports involving multiple murders. By beginning with this subset of all cases reported since 1965, we do not mean to suggest that we consider all of these to be "similar cases" to Benn's for the purposes of the proportionality review. Rather, we will use this characteristic initial common denominator as a point of departure in our search for family resemblances and similar cases.

Thomas Baja (No. 59),[8] at the age of 43, murdered his ex-wife and her male companion after entering her home. The State alleged and the jury found that Baja shot both victims in the head as part of a common scheme or plan. There was no torture or hostage element to the crime. Baja suffered from post traumatic stress disorder and Baja's crime appears to have been one of passion. The death penalty was not sought, and Baja received a sentence of life without parole.

Gregory Brown (No. 12), while 25 years of age, murdered his 17-year-old common law wife (and mother of his child) and her 22-year-old uncle. Both were killed with a handgun as part of a common scheme or plan. Brown's wife was shot several times in the head; her uncle was shot several times as well. As with Benn, the aggravating factor found was multiple victims murdered as part of a common scheme or plan. There was no evidence of torture. Brown had a criminal record. He was diagnosed as paranoid schizophrenic. The death

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[8] The numbers referenced here are the sequential numbers assigned to the trial court's reports as they are received by this court.

penalty was not sought, and Brown received life without parole. Brown's mental illness is a significant mitigating factor which serves to distinguish his case from Benn's.

Henry Dailey, Jr. (No. 108) and David Simmons (No. 107) were codefendants. They were convicted of conspiracy to commit murder as well. Aggravating factors in these cases were multiple victims as part of a common scheme or plan, and murders were committed in furtherance of a robbery and committed to conceal the identities of the defendants. Dailey was 22 at the time of the offense and Simmons was 42. Both had prior records. The victims were a Mr. and Mrs. Crabtree. Mr. Crabtree was a contractor and an acquaintance of Simmons. The defendants shot him. Mrs. Crabtree was strangled to death with a belt. There was no evidence of torture, but the report indicates the victims were hostages for a short time. The death penalty was not sought in either case and both Dailey and Simmons were sentenced to life without parole.

Charles Defrates (No. 32) was 46 when he murdered his brother's wife, age 21, and her brother, age 20. He pled guilty to the murders, and the prosecutor dropped the death notice filing in exchange for the plea. The victims had been held hostage. Defrates had a prior record. Defrates was sentenced to life without parole. Aggravating circumstances were murders for concealment and multiple victims as part of a common plan.

Westley Allan Dodd (No. 76), at the age of 28, killed three victims, all children. No mitigating evidence was presented; aggravating circumstances were concealment, multiple victims, rape and kidnapping. Dodd pled guilty. There was evidence that the victims were tortured. Dodd was diagnosed as having a behavior disorder and being a sexual deviant. The death penalty was sought and imposed by the trial court. We reject any notion that Benn's case and Dodd's are similar.

Charles Campbell (No. 9), like Dodd, was sentenced to death for extremely brutal crimes. There were three victims, ages 8, 31 and 51. There were at least five aggravating factors: Campbell murdered while serving time, as part of a common scheme, killed a witness, murdered to protect his identity, and murdered during a burglary. No mitigation was presented. The victims were tortured. These extremes are not present in Benn's case, and we reject any notion that Benn's case and Campbell's are similar.

Gregory Fish (No. 96) was 28 at the time he murdered his estranged wife and sister-in-law. He pled guilty and the death penalty was not sought. Aggravating circumstances were concealment, multiple victims and burglary. Fish had a prior record, was a long-term drug abuser, and was diagnosed as having an antisocial personality. The crime could be fairly characterized as one of passion. Prosecution and defense stipulated to mitigating circumstances. Fish was sentenced to life without parole.

Pompeyo Guloy (No. 5) was a codefendant of Jimmy Ramil (No. 4), Constantine Baruso (No. 112), and Fortunato Dictado (No. 22). The State did not seek the death penalty in the cases of any of these defendants. Their victims were rival union officials. The only aggravating circumstance was multiple victims in a single event. The death penalty was not sought, thus no mitigating factors are listed in the report. There were no aspects of torture or hostage taking. The purpose of the killings was elimination of the victims as rivals. Both victims were adult males, age 29. One died instantly and one was shot 3 or 4 times and lived for about 13 hours. Guloy had no known prior record. Ramil and Dictado had prior felony convictions. Baruso had prior federal felony convictions. These defendants received life without parole.

Clark Hazen (No. 39) was 18 at the time of his crime. He murdered two neighbors whom he knew only slightly, a 65-year-old retired man and his 27-year-old nurse. Both were shot in the head. Aggravating circumstances were concealment and

murder in furtherance of robbery and rape. No common scheme or plan was found. Mitigating factors offered were the youth of the defendant, history of his being abused as a child, and an organic brain dysfunction. The death penalty was sought and imposed at trial.[9]

Darrin Hutchinson (No. 68) shot two Island County Sheriff's deputies in the head at close range. The aggravating factor of common scheme or plan for multiple murders was found. The defendant was 26 and had a prior record. He shot the officers when stopped for a DWI arrest. Mitigation offered was a defendant IQ of only 79, intoxication at the time of the crime, and a history of abuse as a child. Death was sought, but the defendant was sentenced to life without parole. The mental disability and intoxication of the defendant in this case strongly distinguishes it from Benn's.

Patrick James Jeffries (No. 15) murdered a husband and wife while he was their houseguest. Aggravating factors found

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[9] We note that Hazen killed himself in prison before either his conviction or sentence could be reviewed.

were concealment of identity and multiple victims as part of a common scheme or plan. The victims were adults in their 50's. Jeffries, who was in his 40's at the time of the crime, had a prior record. Offered in mitigation was Jeffries' artistic talent. The death penalty was sought and imposed. The scant mitigation offered in Jeffries' case is significant in comparison with Benn's case.

William Kincaid (No. 16) shot his estranged wife, age 24, and her sister, age 26, with a shotgun. Kincaid was convicted of aggravated murder and second degree murder. The sole aggravating circumstance found was multiple victims as a result of a single act. Mitigation was that Kincaid had been out of work 2 years and attempted suicide after the murders. The death penalty was not sought and the defendant was sentenced to life without parole.

Minviluz Macas (No. 101) set fire to her house, killing her 85-year-old husband and her children, ages 9 and 11. Aggravating circumstances were multiplicity of victims and

arson. She had no prior record. The death penalty was not sought.

Kwan Fai Mak (No. 13), along with Benjamin Ng (No. 14), was convicted in the murder of 13 victims (12 men and 1 woman). Aggravating factors were multiple victims, robbery furtherance, and concealment. Each defendant pointed to the other as the killer. The victims were hog-tied prior to their execution-like murders and one was beaten. Mak had no prior record. Eyewitness testimony suggested the State's main witness may have been wrong in describing Mak's role in the crime. Mak was 23 at the time of his conviction. Death was sought and imposed by the trial court on all 13 counts against Mak. Ng presented mitigating evidence of diminished capacity, youth, and lack of a prior record (only second degree theft). Ng was sentenced to 13 terms of life without parole. Due to the extreme number of victims in this crime, we do not find Mak's and Ng's cases similar to Benn's.

William Gary Martin (No. 20) entered the home of his victims and shot them, one in the head and one in the chest. Aggravating circumstances were multiple victims during a burglary. The victims, Mr. and Mrs. Tillman, were the parents of Martin's former fiancee. Martin blamed them for the breakup. Mitigating evidence presented was limited prior criminal history, youth of defendant (around 20 at the time of the murders), diminished capacity, and emotional disturbance. The State sought the death penalty. The jury was unable to reach a unanimous verdict. Martin was sentenced to life without parole. Martin's youth and state of mind at the time of the murder distinguish his case from Benn's.

Mark McKinley (No. 105) murdered his common-law wife and her mother. The sole aggravating circumstance found was multiple victims. The death penalty was not sought. McKinley received a sentence of life without parole.

Russell McNeil (No. 61) (codefendant of Herbert Rice, No. 70) was only 17-1/2 at the time of his arrest. McNeil pled

guilty prior to trial. Aggravating circumstances were concealment, multiple victims and burglary. McNeil killed his male and female victims with a knife. Both were elderly people and were badly mutilated. The youth of the defendant was entered in mitigation. McNeil's sole prior offense was a second degree burglary. The State did not seek the death penalty.

William Pawlyk (No. 116) murdered two victims, his ex-girlfriend and her boyfriend. The aggravating circumstance was multiplicity of victims. This crime was characterized as a crime of passion. Torture was a possibility in the murders. Pawlyk had no prior record. Death was not sought, and Pawlyk pled insanity. He received a sentence of life without parole.

Rick Peerson (No. 86) murdered two persons who had sold marijuana to him. Peerson had held the victims hostage, and one of the murders involved torture. The victims were beaten to death with various objects. Aggravating factors were multiple victims, robbery, and prior criminal record. Mitigation was offered that Peerson suffered from brain damage after a car

accident which caused a head injury. Post-traumatic stress disorder was also offered as mitigation. The State sought the death penalty. The jury sentenced Peerson to life without parole.

Kenneth Peterson (No. 42) murdered a husband, age 30, and wife, age 24. The wife had to drive with Peterson to a graveyard after Peterson murdered her husband. She was shot twice. Multiple victims was the sole aggravating circumstance. A diagnosis that Peterson was psychotic and his artistic skills were offered as mitigation. The State sought the death penalty. The jury was unable to agree. Peterson was sentenced to life without parole. Psychosis of this defendant is a factor which distinguishes this case from Benn's.

Shawn Dee Reite (No. 84) was 20 at the time she murdered her adopted mother and boyfriend while they slept. Both were shot in the head. Aggravating circumstance was multiplicity of victims. Death was not sought by the State. Reite received a sentence of life without parole.

Herbert Rice (No. 70) (not to be confused with David Rice), at the age of 17, brutally murdered an elderly couple. Aggravating circumstances found were concealment, multiple victims, killed during burglary and robbery. The victims were stabbed and tortured while aware that the other was suffering. Mitigation offered was youth, limited criminal history and extreme emotional disturbance. The jury could not agree as to the death sentence sought by the State. Rice received a sentence of life without parole. The judge commented in his report he thought the sentence was inappropriately lenient. We distinguish Rice's case based on the defendant's age of 17.

David Rice (No. 43) murdered two adults and two children aged 12 and 10. All four victims were bludgeoned and stabbed to death. Aggravating factors were multiple victims, concealment and murder during felony. Rice was 27 at the time. There was evidence of torture. Mitigation offered was psychiatric testimony of a behavior disorder. Rice had a record

including grand theft auto and lewd conduct. He was sentenced to death.

Stanley Runion (No. 99) murdered three people in a drug-related incident. One victim was a child, aged 16; the others were adults aged 34 and 23. The sole aggravating factor was the multiplicity of victims as part of a common scheme or plan. Runion had a prior record, including assault with a deadly weapon. Evidence showed the victims were hostages for less than an hour. The death penalty was not sought. Runion was sentenced to life without parole.

Mitchell Rupe (No. 7, No. 31) was age 27 at the time he murdered two adult female victims during a bank robbery. Aggravating circumstances were concealment, multiple victims and robbery. Mitigation offered was Rupe's lack of any criminal history, his community service, his military service, and lack of other violence in background. Rupe was sentenced to death.

Martin Sanders (No. 81) was 30 at the time he murdered two 14-year-old girls after raping them. Aggravating circumstances were rape, concealment, and multiple victims. Both victims were strangled; one was also bludgeoned with a tire jack. Sanders had a prior record including kidnap, assault, and sexual intercourse without consent. Sanders pleaded guilty. Death sentence was not sought in exchange for a complete statement by the defendant. The victims' families agreed to the seeking of only life without parole, not capital punishment.

Sean Stevenson (No. 50) was convicted of three murders, but only one was found to be aggravated. The aggravating circumstance was rape. There was evidence of torture. The victims were his stepfather, mother and sister. The death notice was withdrawn, the prosecutor accepting psychiatric opinion regarding the defendant. Stevenson was 16 at the time of the offenses. There was evidence of abuse of the defendant by his stepfather. This case is also significantly

distinguishable from Benn's; we rule it out for consideration as a similar case.

Robert Strandy (No. 37), along with an accomplice, murdered two adult male victims ages 39 and 41. Both were tied, gagged and shot in the head. The defendant had spent most of his adult life in prison and knew one of the victims from a drug treatment program. The sole aggravating factor was murder in the course of a robbery. A psychiatric evaluation was performed, although its results were not disclosed. The death penalty was not sought. Strandy was sentenced to life without parole after trial.

Lawrence Sullens (No. 69) was 25 at the time he murdered two adult victims, a husband and wife. The victims' 11-year-old daughter was beaten, shot and left in the house when Sullens started the house on fire. She survived. Aggravating circumstances were concealment and multiple victims. The death penalty was not sought. Sullens received a sentence of life without parole.

James Thompson (No. 53) murdered a couple ages 66 and 71. Aggravating circumstances were concealment, multiple victims and robbery. A sentence of death was sought. Mitigation offered was Thompson's alcoholism and a behavior disorder. Thompson had a prior record of theft and robbery. He beat his male victim. Thompson was sentenced to life without parole.

In comparison, we consider first Benn's crime. Lord, at 911. Gary Michael Benn (No. 75) was convicted of two counts of aggravated first degree murder. He murdered two adult males ages 46 and 45 by shooting them in the chest and then shooting them in the back of the head at close range. The sole aggravating circumstance was the multiplicity of victims killed as part of a common scheme or plan. We also consider Benn's personal characteristics. Lord, at 912. Statutory mitigating factors were offered regarding Benn's character and the loss to his family if he were executed. Conflicting psychological information as to Benn's competence to proceed with trial was

offered by three experts, Dr. Carl Reddick, Dr. Lloyd Cripe, and Dr. Brett Trowbridge. Such testimony did not go to Benn's state of mind at the time of the offenses or mitigate Benn's responsibility for his own acts.

The psychological report by Dr. Cripe indicated "severe borderline and narcissistic personality disorder". The psychological report by Dr. Trowbridge indicated an isolated delusional (paranoid) disorder discussed above and unrelated to the crime. The psychological report by Dr. Reddick indicated Benn was manipulative and malingering. Benn had prior convictions, none involving violence: two first degree theft convictions and one grand larceny conviction. The trial judge's comments on the report mandated by RCW 10.95.120 state: "It was a horrible, brutal crime. The defendant was very manipulative with everyone including his own counsel, psychologists, the court and the jury."

Both parties to this appeal agree that the Campbell, Mak, Rice and Dodd cases differ greatly from Benn's. The

State decries what in the appellant's brief was offered as statistical argument for disproportionality. The defense offered statistics without case names: 19 cases in which a defendant killed twice, with the State seeking the death penalty in 12 cases and a death sentence imposed in 4 cases. While decrying statistics, the State countered with its own: 31 cases in which the aggravating factor of multiple victims was alleged, if not proven, with the State not seeking death in 17 of those cases. As noted above, this court has previously rejected such an approach:

> Simply comparing numbers of victims or other aggravating factors may superficially make two cases appear similar, where in fact there are mitigating circumstances in one case to explain either a jury's verdict not to impose the death penalty or a prosecutor's decision not to seek it.

In re Jeffries, 114 Wn.2d 485, 490, 789 P.2d 731 (1990). The State also relies on this language from In re Jeffries:

> The proportionality of a particular defendant's death sentence does not depend upon the State's seeking the death penalty in every case, however, or even in some threshold proportion of cases.

In re Jeffries, at 489-90. Proportionality review is not an inquiry into sentencing percentage comparisons.

The State offers as instructive six multiple aggravated murder cases where the facts, it suggests, resemble Benn's case: Clark Hazen (No. 39), William Gary Martin (No. 20), Sean Stevenson (No. 50), Darrin Hutchinson (No. 68), Thomas Baja (No. 59), and Gregory Brown (No. 12).

Hazen	received the death penalty
Martin	jury could not agree/life without parol
Stevenson	jury could not agree/life without parole
Hutchinson	death penalty notice dismissed
Baja	death penalty not sought
Brown	death penalty not sought

The State argues there were mitigating factors present in several of these cases not present in Benn's, explaining why the death penalty was not imposed: In Martin's case, the defendant was 21 years old; in Stevenson's case, the defendant was 16; in Hutchinson's case, the defendant had an IQ of 79, was intoxicated at the time of the offense, and suffered a history of abuse; in Baja's case, the defendant suffered from post-traumatic stress disorder; and in Brown's case the defendant was diagnosed as paranoid schizophrenic.

The State also offers the cases of State v. Rupe, State v. Jeffries, and State v. Rice, Supreme Court cause 56932-1 (filed Jan. 28, 1993) (Herbert Rice) for comparison. In Rupe and Jeffries, it is argued by the State that more mitigation was offered in those cases than by Benn, yet death was imposed. In Rice, severe mental disturbances surrounded the crimes. In the lack of prior violent offenses Benn's case resembles Rupe's, in which death was imposed in spite of a lack of prior criminal record. Benn distinguishes the Jeffries death sentence from his own case based on Jeffries' violent history. The defense argues State v. Hazen, Clark Cy. cause 85-1-00322-5 (Apr. 16, 1986) is distinguishable based on the aggravating factor of a brutal rape prompted by Hazen's premeditated goal of reenacting a rape scene in a pornographic film. Regarding Rupe, the defendant argues that "[n]one of the facts surrounding the crime in Rupe are even remotely similar to those in [Benn's] case." Reply Brief of Appellant, at 94. The disagreements of the State and the defendant as to the applicability of cases to a

comparative proportionality review of Benn's sentence highlight the difficulties inherent to the identification of "similar cases".

There are some generally identifiable traits in the RCW 10.95.120 reports which are evident when persons convicted of multiple first degree aggravated murders are not sentenced to death or have avoided the filing of a special sentencing notice for the death penalty. These factors generally involve mental defects or disturbances, or a defendant being youthful, or a plea of guilty. The last factor, involving pleas of guilty such as in the Defrates case (No. 32), indicates remorse or confession of a crime by the defendant may be viewed by prosecutors or juries as significant mitigation. While these factors are not automatic indicators that a death sentence should or should not be applied in a given case, from a comparative proportionality analysis they apparently cause death sentences to be sought or imposed with less frequency. There are exceptions, such as is illustrated by the death sentence in State v. Hazen for a defendant 19 at

the date of his conviction, and the sentence against David Rice entered over the mental disturbance mitigation offered.

The case of Gary Benn, however, did not offer any of these personal characteristic factors of youth, mental defect or disturbance, or a plea of guilty in mitigation of his act of multiple murder. In comparing Benn's case, we find several somewhat similar cases in which the penalty of death was not sought or imposed and several in which it was. Generally, however, in those cases in which the death penalty was either not sought or not imposed upon multiple murder defendants, those cases did not appear to be in the same genus or family as Benn's case and were thus not "similar". By the same token, we would not call the Dodd, Campbell, Mak, or David Rice cases similar to Benn's.

The similar cases we have derived from the above listing for purposes of determining the comparative proportionality of Benn's sentence are: McKinley, No. 105 (murdered girlfriend and her mother, one aggravating factor);

Runion, No. 99 (drug-related killing); Strandy, No. 37 (two adult victims shot in head at close range); and Thompson, No. 53 (murdered couple during robbery) in which the defendants were sentenced to life without parole; and Hazen, No. 39 (murdered two neighbors); Jeffries, No. 15 (murdered couple while a guest in their home); and Rupe, No. 7 & No. 31 (murdered two tellers during bank robbery), in which the defendants were sentenced to death.

This group of cases similar to Benn's does not contain an arbitrary frequency of life without parole sentences over death sentences. Even in this group of "similar" cases there are factors making each case unique and thus still not the same as Benn's. We have sought to find a fair group of multiple murder cases for comparison based upon resemblances in aggravating or mitigating factors and overall culpability. We have also taken an analysis focused on resemblances to sentences of life without parole and death sentences rather than only comparing Benn's case to existing death sentence precedents, the latter

being an approach of questionable reliability which has been criticized in commentary. We have done so with a view toward detecting and undoing arbitrariness, caprice, or prejudice in the jury's sentence. This court may systematically seek to undo and thus eradicate arbitrariness in sentencing. It will have limited success, however, in systematizing the unpredictable impulse toward mercy among juries which must decide cases that are ultimately as unique as each defendant. We have not sought to substitute this court's judgment for that of the jury. Having considered both the crime and the defendant as required by statute, we hold Benn's sentence of death to be comparatively proportionate to the sentences imposed in similar cases and not arbitrarily, wantonly or freakishly imposed.

Passion or Prejudice in Sentencing

Benn argues the sentence of death in his case was imposed as a result of passion or prejudice.

Under RCW 10.95.130(2)(c), the "no passion or prejudice" determination is mandatory. The defendant asserts

that this review is a proper context for defense presentation of cumulative trial error. In State v. Lord, 117 Wn.2d 829, 914-15, 822 P.2d 177 (1991), however, we rejected the defendant's reiteration of alleged trial errors addressed in other parts of Lord's appeal as support for a passion or prejudice argument. "Prejudice" for purposes of this statutory review is not to be equated with motions on which the defense was unsuccessful or with situations which in hindsight appear to be strategic errors by the defense. The defendant's claims of error arising from the prosecution's closing argument are addressed above. The State presented no evidence in the penalty phase, and there is no indication that the verdict was the product of passion or prejudice.

Cruel and Unusual Punishment

Benn argues the death penalty is cruel and unusual punishment.

This argument has been rejected repeatedly by this court, as well as by the United States Supreme Court. See

Gregg v. Georgia, 428 U.S. 153, 168-87, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976); State v. Campbell, 103 Wn.2d 1, 31, 691 P.2d 929 (1984); State v. Lord, supra at 915-16.

Pierce County Notice Procedures and Due Process

Benn argues the procedures of the Pierce County Prosecutor regarding notice under RCW 10.95.040(1) violate due process.

This contention, addressed specifically at Pierce County's death penalty notice procedures, was rejected by this court in In re Harris, 111 Wn.2d 691, 692-95, 763 P.2d 823 (1988).

Signing of the Notice To Seek Special Sentencing

Benn argues the notice to seek a special sentencing proceeding as required under RCW 10.95.040(1) was in his case improperly signed by a deputy of the elected prosecuting attorney and filed by a designee.

Under RCW 36.27.040:

> The prosecuting attorney may appoint one or more deputies who shall have the same power in all respects as their principal.

Delegations of the prosecutor's authority do not vitiate what is an agency relationship between the prosecutor and his or her deputies or designees.[10]

CONCLUSION

We find no reversible error committed in either the guilt or sentencing phase of Benn's case. Evidentiary rulings were within the discretion of the trial court. The jury instructions were in accordance with the rulings of this court, and those refused were either unsupported by the evidence, contrary to law, or cumulative. The trial court's refusal to continue the penalty phase was within the judge's sound discretion and was based upon evidence the judge properly accepted as credible. In the sentencing phase, the prosecution offered no rebuttal of mitigation witnesses and the trial court permitted all mitigation evidence Benn chose to offer. Also,

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[10] The record reflects that John Ladenburg, the Pierce County prosecuting attorney, participated in deliberations and made the final decision to file the special sentencing notice in Benn's case.

even though certain portions of Benn's allocution were testimony, the judge nevertheless permitted Benn to make as complete a statement as he chose.

The jury was convinced by sufficient evidence beyond a reasonable doubt that mitigation evidence was outweighed by the aggravating circumstances of Benn's crime of multiple murders, and we will not overturn this finding. Neither passion nor prejudice influenced the jury's determination that death is the appropriate penalty for a crime in which both the defendant and his victims had apparently shared in prior criminal conduct which led to disagreement and then murder.

The determination of whether the sentence of death imposed upon Benn was excessive or disproportionate involved the evaluation of many other cases, some in which the death penalty was imposed and some in which it was not. The record in Benn's case and our proportionality evaluation of that record lead us to a conclusion that the penalty of death imposed

on Benn was not arbitrary nor imposed in a wanton or freakish manner.

We affirm Gary Benn's conviction and death sentence for the aggravated murders of Jack Dethlefsen and Mike Nelson.

/s/ GUY, J.

WE CONCUR:

DORE, C/J

State v. Benn
Majority by Guy, J.
Concurrence by Durham, J.
Dissent by Utter, J.

57272-1

DURHAM, J. (concurring) -- I agree with the majority opinion in substance. However, the methodology it employs in the proportionality section is both unnecessary and contrary to existing law. In effect, the majority adopts the precise analysis that was rejected in State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991), cert. denied, 113 S. Ct. 164 (1992). The result is exactly that which we have sought to avoid -- endless pages of comparisons to particular cases. Especially troubling is the fact that the majority compares all cases in a given category (multiple murders). Since this is the most common type of homicide to warrant the death penalty, that means that in every future case of multiple murder, every other case will have to be similarly compared.

This is not a hairsplitting issue -- it goes to the very heart of proportionality. The purpose of proportionality review is to avoid the systemic problems of random arbitrariness and the imposition of the death sentence based on race. Lord, at 909. In order to alleviate these problems, we search for "family resemblances", not individual matches. Lord, at 910-11. Proportionality review serves to "assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally and not 'wantonly and freakishly imposed'". State v. Harris, 106 Wn.2d 784, 798, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940 (1987) (quoting Moore v. State, 233 Ga. 861, 864, 213 S.E.2d 829 (1975)). We specifically search only for such broad tendencies because "[o]ur review is not intended to ensure that there can be no variation on a case-by-case basis, nor to guarantee that the death penalty is always imposed in superficially similar circumstances." Lord, at 910.

While the majority pays lip service to this concept, in practice, it analyzes 30 different cases, 4 of which were acknowledged by both sides to be dissimilar, in a fruitless and misleading attempt to consider all possible matches. All that is necessary in proportionality review is that we look for a trend, not individual case matches. To do otherwise means that the failure of a single match would indicate disproportionality and invalidate the sentence. As we concluded in Lord, requiring such precise uniformity "would effectively eliminate the death penalty." Lord, at 910. In the majority opinion, there are 22 pages devoted to this project. What will be required 10 years from now? It is not enough to say we are following Lord and Harris, and then do the opposite. The current opinion is precisely the case-by-case comparison that was specifically rejected in Lord.

/s/ DURHAM, J.

WE CONCUR:

ANDERSEN, JJ. BRACHTENBACH,

DOLLIVER

State v. Benn
Majority by Guy, J.
Dissent by Utter, J.

No. 57272-1

UTTER, J. (dissenting) -- I would reverse Gary Michael Benn's death sentence because it is disproportionate. I also disagree with several other portions of the majority opinion which, though they do not change the outcome of this case, may unjustly cause others to receive the death penalty.

I

PROPORTIONALITY

The majority neither follows our statutory mandate nor adheres to the purposes underlying proportionality review. It deviates from the governing statute by failing to develop a pool containing all cases similar to Benn's. Finally, it ignores our previous case law. A proportionality review of Benn's sentence which is more consistent with our statutory mandate requires a finding that Benn's sentence is disproportionate.

A. The Purposes of Proportionality Review.

Proportionality review developed in response to the United States Supreme Court's opinion in Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972), which effectively invalidated states' death penalty statutes as violative of the Eighth and Fourteenth Amendments. One of the problems perceived by the Court was the random application of the death penalty. Justice Stewart noted the arbitrary way in which the death penalty was imposed: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." 408 U.S. at 309, 92 S. Ct. at 2762. (Stewart, J., concurring).

Four years later, in Gregg v. Georgia, 428 U.S. 153, 203, 49 L. Ed. 2d 859, 96 S. Ct. 2909, 2939 (1976), the United States Supreme Court approved Georgia's revised death penalty statute, which included a provision for proportionality review by the Supreme Court of Georgia. Although the United States Supreme Court in Pulley v. Harris, 465 U.S. 37, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984) has held that proportionality review

is unnecessary for a constitutionally valid death penalty, our statutorily mandated duty to perform proportionality review under RCW 10.95.130(2) has in no way been diminished.

Our death penalty statute requires this court to engage in proportionality review by determining:

> Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120 . . . .

RCW 10.95.130(2). The first sentence is identical to the Georgia statute approved by the United States Supreme Court. See Ga. Code Ann. § 17-10-35(c)(3) (1990). Therefore, in State v. Harris, 106 Wn.2d 784, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940 (1987), we adopted Georgia's test for proportionality review. The Georgia Supreme Court will not affirm a death sentence "unless in similar cases throughout the state the death penalty has been imposed generally and not

'wantonly and freakishly imposed,'. . .". (Italics mine.) Moore v. State, 233 Ga. 861, 213 S.E.2d 829, 832 (1975) (quoted in Harris, 106 Wn.2d at 798).

Without such review, the death penalty, like lightning, will strike some, but not others, in a way that defies rational explanation. The severity of the death penalty, its irrevocability, and our statutory mandate, require us to assess carefully whether the death penalty has been imposed arbitrarily. We cannot, under the statute, simply defer to a jury's sentencing determination.

Failure to adhere to our statutorily mandated duty to conduct proportionality review would also violate due process. Where defendants have been denied their liberty interests established by state law, the United States Supreme Court has found a denial of due process. See, e.g., Board of Pardons v. Allen, 482 U.S. 369, 96 L. Ed. 2d 303, 107 S. Ct. 2415 (1987) (finding that Montana parole-release statute created a liberty interest entitled to protection under the due process clause);

Hicks v. Oklahoma, 447 U.S. 343, 65 L. Ed. 2d 175, 100 S. Ct. 2227 (1980) (holding that defendant was denied due process where he did not receive the jury sentence to which he was entitled under state law).

B. Salient Factors of Benn's Case

The majority in this case follows State v. Lord, 117 Wn.2d 829, 910-11, 822 P.2d 177 (1991), by stating that our search for similar cases should focus on discerning "family resemblances" among cases. Although imaginative, this is simply a metaphor, not a sound method. The majority in this case correctly refers to the family resemblance approach as impressionistic. Majority, at 63. A better approach would be for us to focus initially on a few salient factors in this case in developing a pool of similar cases. See State v. Jeffries, 105 Wn.2d 398, 436, 717 P.2d 722 (1986) (Utter, J., dissenting).

Multiple victims, which was the sole aggravating factor found by the jury, is probably one of the most important characteristics of this case. Also significant is the fact that the

victims were adults, and there was no torture and the victims probably did not experience substantial conscious suffering prior to death. Benn's prior criminal record consists only of a few property crimes, such as theft and larceny. In mitigation, there was Benn's previous good character, the love of his family, and the loss they would experience if Benn were sentenced to death. I will also follow the majority's approach by largely excluding those cases where a defendant had a mental defect or disturbance, or was youthful. Majority, at 80. In addition, I will exclude cases where defendants pled guilty, even though the majority cites no authority in the statute or case law for excluding them. Even excluding all of those cases, it is readily apparent that Benn's sentence is disproportionate.

C. Creating a Pool of Similar Cases

Although the majority lists many multiple murder cases reported to this court since 1981, it fails to create a pool of all similar cases. First, the pool it does assemble contains cases which should not have been included. Second, without

explanation, it fails to include many post-1981 cases that are similar to Benn's. Finally, it fails to consider cases reported in Washington Reports or Washington Appellate Reports since January 1, 1965 as required by statute.

First, the majority inappropriately includes several cases in its pool of seven similar cases. For example, Clark Hazen (No. 39)[1] should not have been included in the majority's pool. Majority, at 81. Hazen committed suicide in prison before we could review his conviction or sentence. Therefore, there are serious questions about the reliability of Hazen's death sentence. In addition, Hazen's murders were much more brutal, and there were more aggravating circumstances found -- multiple victims, concealment, rape, and robbery. Finally, including Hazen, who was only 18 at the time of his murders, in the pool of similar cases creates a glaring inconsistency. The majority refuses to include cases

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[1] The numbers referenced here are the sequential numbers assigned to the reports of the trial judge as they are received by the Clerk of the Supreme Court.

like that of Herbert Rice (No. 70) and Sean Stevenson (No. 50) because of their youth. It only includes Hazen's case, where the death penalty was imposed. Therefore, Hazen's case should not be included in the pool of similar cases.

Including Jeffries (No. 15) and Rupe (No. 7, No. 31) is also questionable, in light of my criticisms about the way proportionality review was conducted in those cases. See In re Jeffries, 114 Wn.2d 485, 505-06, 789 P.2d 731 (1990) (Utter, J., concurring in part, dissenting in part). To validate a death penalty in this case because it was imposed in those cases would simply perpetuate this court's earlier errors. Although I believe Jeffries and Rupe should be excluded for these reasons, I will include these two cases in my pool of similar cases.

I believe the majority correctly includes the other four cases, McKinley (No. 105); Runion (No. 99); Strandy (No. 37); Thompson (No. 53); in its pool of similar cases. In all four of those cases, the defendants received sentences of life without parole.

However, the majority fails to include 15 other cases that have arisen since 1981 that are similar to Benn's. The following 15 cases match many of the salient features of Benn's case. In all 15 the defendants received life without parole as a sentence. Several of the murders were much more brutal, involving substantial conscious suffering before death, making the defendants more deserving than Benn of the death penalty. See State v. Rupe, 108 Wn.2d 734, 787, 743 P.2d 210 (1987) (Pearson, C.J., dissenting) (noting that almost all cases where defendants were sentenced to death involved substantial conscious suffering prior to death).

Stephen Carey (No. 10) murdered his estranged wife and 18-month-old child by lighting their trailer on fire. See State v. Carey, 42 Wn. App. 840, 714 P.2d 708 (1986). The jury found arson as an aggravating factor. His wife suffered third degree burns over 100 percent of her body and lived for approximately 18 hours after the fire. Carey had no prior record. The State did not seek the death penalty.

Pompeyo Guloy (No. 5) was a codefendant of Jimmy Ramil (No. 4), Constantine Baruso (No. 112), and Fortunato Dictado (No. 22). The State did not seek the death penalty in the cases of any of these defendants. Their victims were rival union officials. The only aggravating circumstance was multiple victims in a single event. The death penalty was not sought, thus no mitigating factors are listed in the report. There were no aspects of torture or hostage taking. Both victims were adult males, age 29, one died instantly and one was shot three or four times and lived for about 12 hours. Guloy had no known prior record. Ramil and Dictado had prior criminal records; Baruso had prior federal felonies. These defendants received life without parole.

David Simmons (No. 107), age 42, and Henry Dailey Jr. (No. 108), age 22, murdered a couple. Gary Crabtree was shot in the head. His wife, Laurie Crabtree, was strangled with her husband's belt. The jury found three aggravating factors in each of these cases: multiple victims as part of a common

scheme or plan, murders committed in furtherance of robbery, and committed to conceal the identity of the person committing the crime. Simmons had an extensive criminal record, including convictions for first degree robbery and theft. Dailey had convictions for first degree robbery and second degree burglary. The State did not seek the death penalty. Both defendants received life without parole.

William Kincaid (No. 16) murdered his wife and sister-in-law with a shotgun after a marital breakup. The only aggravating circumstance was multiple murders. No prior criminal record is listed in the report. The State did not seek the death penalty, and Kincaid received a sentence of life without parole.

Minviluz Macas (No. 101) set fire to her house, killing her 85 year old husband and two of their children, ages 9 and 11. The jury found multiple murders and arson as aggravating factors. She had no prior record. The State did not seek the death penalty, and she received life without parole.

Frederick Peerson (No. 86), murdered two persons who had sold marijuana to him. He held one victim hostage. Peerson tied the victim to a chair with electrical cords and a leather belt, poked sharp objects into his ears, and struck him on the head with a large crescent wrench. The jury found two aggravating circumstances, multiple victims and robbery. Mitigation evidence was offered that Peerson suffered brain damage as a result of a car accident. The report also indicates Peerson suffered from post traumatic depression and an antisocial personality. His record included a second degree burglary conviction, and attempted murder. The State sought the death penalty, but Peerson received a sentence of life without parole.

Kenneth Peterson (No. 42) murdered a husband, age 30, and wife, age 24. After murdering the husband, Peterson forced the wife to drive to a graveyard, where he shot her twice. Multiple victims was the only aggravating circumstance. In mitigation, Peterson's diminished mental capacity and his

artistic skill were offered. Peterson had no prior criminal record. The State sought the death penalty, but the jury was unable to agree. He received life without parole.

George Russell (No. 120) was 33 years old when he was convicted of two counts of aggravated first degree murder and one count of first degree murder. Burglary was the aggravating circumstance. The defendant was convicted for three serial murders of young women. Russell, like Benn, had previous convictions for property crimes. The State did not seek the death penalty, and Russell received life without parole.

At age 25, Lawrence Sullens (No. 69) murdered a couple in their home. He also beat and shot their 11-year-old daughter. She survived, even though he left her in the house and lit it on fire. The jury convicted Sullens of two counts of aggravated first degree murder, one count of attempted first degree murder, and one count of first degree arson. It found concealment and multiple victims as aggravating

circumstances. The report indicates Sullens had no prior criminal record. The State did not seek the death penalty. Sullens received life without parole.

Thomas Baja (No. 59),[2] at the age of 43, shot his ex-wife and her male companion in the head after entering her home. The jury found one aggravating factor -- multiple victims. The report lists no prior criminal record. The only mitigating evidence listed was that the defendant suffered from posttraumatic stress disorder. Baja received life without parole.

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[2] Although the majority does not expressly indicate why Baja and Pawlyk are not part of its pool of similar cases, it suggests that the difference between these cases and Benn's is that these were "crimes of passion". Majority, at 64, 72. This is not an adequate basis for distinguishing these cases.

To characterize these defendants' crimes as ones of passion contradicts, at least in part, their convictions for aggravated first degree murder. In order to be convicted of aggravated first degree murder, RCW 10.95.020 requires that an individual commit first degree murder as defined by RCW 9A.32.030(1)(a). Under RCW 9A.32.030(1)(a) one is guilty of first degree murder if one acts "[w]ith a premeditated intent to cause the death of another person". RCW 9A.32.030(1)(a). Even though strong emotions may have motivated the defendants in these cases, the jury still found that they both had developed a conscious plan to take another's life. I reject the notion that domestic violence that culminates in aggravated first degree murder is somehow less serious.

William Pawlyk (No. 116) murdered his ex-girlfriend and her new boyfriend. The aggravating circumstance was multiple victims. Both victims were stabbed in excess of 100 times. Pawlyk had no prior record. The State did not seek the death penalty. Pawlyk pled insanity, which the jury rejected. He received a sentence of life without parole.

Adding these 15 cases to the 6 cases from the majority's pool makes a total of 21 similar cases since 1981. Only 2 out of 21 of the defendants in those cases received the death penalty. This is a frequency of less than 10 percent.

But even this pool of 21 similar cases does not represent the totality of cases we must consider for purposes of proportionality review. Yet another flaw in the majority's development of a pool of similar cases is its failure to mention any of the cases decided between 1965 and 1981. Our statute mandating proportionality review requires us to consider not only post-1981 cases where reports have been filed with us, but also those "cases reported in the Washington Reports or

Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed". RCW 10.95.130(2)(b).

Six cases involving the murders of more than one person between 1965 and 1981 where the judge or jury considered imposition of the death penalty are similar enough to Benn's that we must use them for purposes of proportionality review.

In one of those six cases, the defendant was sentenced to death. State v. Quinlivan, 81 Wn.2d 124, 499 P.2d 1268 (1972) (defendant convicted of one count of first degree murder and one count of second degree murder and sentenced to death).[3] In the other five cases, the jury did not sentence the

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[3] There are a few murder cases where defendants were sentenced to death that I do not include in the pool of similar cases because they are distinguishable. State v. Canaday, 79 Wn.2d 647, 488 P.2d 1064 (1971) (defendant convicted of two counts of first degree murder for tying up two women, raping them, and then strangling them), vacated in part, 408 U.S. 940 (1972); State v. Smith, 74 Wn.2d 744, 446 P.2d 571, (two brutal murders in the course of several robberies), vacated in part, 408 U.S. 934 (1972); State v. Hawkins, 70 Wn.2d 697, 425 P.2d 390 (1967) (defendant

defendants to death. State v. Grisby, 97 Wn.2d 493, 647 P.2d 6 (1982), cert. denied, Frazier v. Washington, 459 U.S. 1211 (1983) (death penalty sought, but not imposed, on two defendants convicted of five counts of aggravated murder); State v. Carothers, 9 Wn. App. 691, 514 P.2d 170 (1973), aff'd, 84 Wn.2d 256, 525 P.2d 731 (1974) (defendant robbed and killed elderly couple); State v. Haga, 81 Wn.2d 704, 504 P.2d 787 (1972) (defendant convicted of two counts of first degree murder for slaying of wife and 7-month old daughter); State v. Baker, 78 Wn.2d 327, 474 P.2d 254 (1970) (defendant shot estranged wife and mother-in-law).

Admittedly, the cases between 1965 and 1981 are less useful in many respects for conducting proportionality review. In making comparisons, we do not have the benefit of the more detailed information contained in the questionnaires trial courts

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convicted of murdering two children), cert. denied, 390 U.S. 912 (1968). In addition, two codefendants were convicted of three murders during robberies and sentenced to death, but irregularities in jury selection resulted in reversal of their sentences. State v. Aiken, 75 Wn.2d 421, 452 P.2d 232 (1969), rev'd, 403 U.S. 946 (1971).

have completed since 1981 as required by RCW 10.95.120. In addition, defendants in those cases were sentenced under earlier versions of Washington's death penalty statute which have subsequently been declared unconstitutional. None of those sentenced to death during that period has been executed. Nonetheless, it is striking that even under these earlier versions of our death penalty statute, defendants in cases similar to Benn's were sentenced to death in only one of six similar cases, or about 17 percent.

The following chart summarizes the results in cases similar to Benn's:

	Similar Cases	Death Penalty Imposed	Death Penalty Percentages
1981-present	21	2	Less than 10 percent
1965-1981	6	1	About 17 percent
Total	27	3	About 11 percent

Therefore, in cases similar to Benn's, the death penalty was imposed in only 3 out of 27 cases, or about 11 percent of the time.

D. Determining Whether the Death Penalty Is Proportionate

After developing a pool of similar cases, the majority also fails to apply the correct test for determining whether Benn's sentence is proportionate. RCW 10.95.130(2)(b) requires us to determine whether the death penalty is "excessive or disproportionate to the penalty imposed in similar cases". In the past, we have followed Georgia's test for proportionality, which is whether the death penalty has "been imposed 'generally' in similar cases." State v. Harris, 106 Wn.2d 784, 798, 725 P.2d 975 (1986) (citing Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975)), cert. denied, 480 U.S. 940 (1987). The word "generally" means significantly more than 50 percent. State v. Jeffries, 105 Wn.2d 398, 437, 717 P.2d 722 (Utter, J., dissenting), cert. denied, 479 U.S. 922 (1986). Here, the death penalty has only been imposed in 3 out

of 27 cases, or about 11 percent of the time, so it has not been generally imposed.

The majority fails to address the issue of whether the death penalty has been generally applied in similar cases. It simply inquires whether there is an "arbitrary frequency of life without parole sentences over death sentences" among cases similar to Benn's. Majority, at 82. It cites no authority for this approach, and gives no reasons for departing from the standards we and other states with similar statutes have adopted.

The majority's version of proportionality review is inconsistent with that employed in several states, such as North Carolina, Pennsylvania, and Georgia, which have statutes mandating proportionality review virtually identical to Washington's. In these other states, the death penalty is deemed proportionate if it is applied in the vast majority of similar cases.

For example, North Carolina's statute mandating proportionality review of death penalty cases contains the same language as our statute, namely whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C. Gen. Stat. § 15A-2000(d)(2). A review of North Carolina's death penalty cases reveals that the death penalty is deemed disproportionate where it has been applied less than half the time in similar cases. See, e.g., State v. Cummings, 372 S.E.2d 541, 552 (N.C. 1988), (finding death penalty proportionate where death penalty imposed in four of five other cases in which a defendant had been convicted of a prior violent felony resulting in the victim's death), cert. granted and judgment vacated on other grounds, 110 S. Ct. 1464 (1990); State v. Benson, 372 S.E.2d 517, 523 (N.C. 1988) (finding death penalty disproportionate where death penalty imposed in only 4 out of 51 robbery-murder cases); State v. Stokes, 352 S.E.2d 653, 665 n.14 (N.C. 1987) (finding death penalty

disproportionate, because co-defendant given life sentence, and because North Carolina juries have recommended life imprisonment in especially heinous cases in 20 cases involving 24 defendants, while recommending the death penalty in 16 cases involving 17 defendants); State v. Rogers, 341 S.E.2d 713, 732 (N.C. 1986) (finding death penalty disproportionate for defendant found guilty of shooting one individual and attempting to shoot another, where in the pool of similar cases death was the penalty in 23 cases and life sentences in 76 cases), overruled on other grounds, State v. Vandiver, 364 S.E.2d 373 (N.C. 1988); State v. Young, 325 S.E.2d 181 (N.C. 1985) (finding the death penalty disproportionate where death penalty imposed in 5 out of 28 robbery-murder cases in the pool of similar cases); State v. Bondurant, 309 S.E.2d 170, 182 (N.C. 1983) (finding death penalty disproportionate where applied only in 13 out of 78 similar cases).[4]

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[4] The North Carolina Supreme Court has stated that numerical disparity is not always dispositive of a case where some additional heinous fact is involved. See, e.g., State v. Greene, 376 S.E.2d 430, 445 (N.C. 1989) (finding death penalty proportionate where defendant committed brutal

North Carolina's experience with proportionality review also belies the majority's claim that a more exacting form of proportionality review would, in effect, substitute this court's judgment for that of the jury. North Carolina has not overturned an inordinate number of death sentences through proportionality review. In a recent case, the court stated that it had affirmed the guilt and sentencing phases in 38 capital cases. It had vacated the death sentence as disproportionate in 6 cases. Cummings, at 198. This is less than one in seven, or about 14 percent. Presumably, if we adopted a similar methodology, we would not frequently substitute our judgment for that of the jury, provided of course that statewide patterns of action are taken into account before the death penalty is sought.

Pennsylvania also has a statute mandating proportionality review which is virtually identical to Washington's. 42 Pa. Cons. Stat. Ann., § 9711(h)(3)(iii)

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patricide), cert. granted & judgment vacated on other grounds, 110 S. Ct. 1465 (1990).

(Purdon Supp. 1992). The Pennsylvania Supreme Court looks closely at the relative frequency of death sentences in the pool of similar cases it develops, approving death sentences as proportionate where the vast majority of defendants in similar cases also received the death penalty. See, e.g., Commonwealth v. Smith, 511 Pa. 343, 513 A.2d 1371 (1986) (finding death penalty proportionate where it was imposed in eight out of nine similar cases), cert. denied, 480 U.S. 951 (1987); Commonwealth v. Whitney, 511 Pa. 232, 249-50, 512 A.2d 1152, 1161-62 (1986) (finding death penalty proportionate where it was imposed in the "overwhelming majority" of similar cases); Commonwealth v. Pirela, 507 A.2d 23 (1986) (finding death penalty proportionate where it was imposed in six out of eight similar cases); Commonwealth v. Morales, 494 A.2d 367 (Pa.1985) (finding death penalty proportionate where sentence imposed in seven out of seven similar cases).

Finally, we should follow the example set by the Georgia Supreme Court, which in the past has provided us with

guidance in conducting proportionality review. Harris, 106 Wn.2d at 798. In D. Baldus, G. Woodworth, & C. Pulaski, Equal Justice and the Death Penalty: A Legal and Empirical Analysis 198-228 (1990) the authors describe a study of 68 of the 69 death penalty cases the Georgia Supreme Court reviewed pursuant to its post-Furman proportionality legislation. The study indicates that when the Georgia Supreme Court finds a sentence proportionate, the sentences in most, if not all, of the similar cases, were death sentences. The authors note that

> in almost 90 percent of the sixty-eight cases that we analyzed, every case identified in the court's appendix as similar to the death case under review resulted in a death sentence. For only five of the sixty-eight cases was the death-sentencing rate among the appendix cases less than .75, and for only one case was it less than .50.

(Footnote omitted.) Equal Justice, at 203. Therefore, once the Georgia Supreme Court creates a pool of similar cases, it does not simply rely on one or two isolated precedents to justify its conclusion that the death penalty is proportionate. Instead, it

finds the death penalty proportionate when the punishment in the vast majority of cases in the proportionality pools was death. In other words, it finds the death penalty proportionate only where it has generally been imposed.

I cannot, following our statutory mandate, ease the requirements of comparative proportionality review to the point where it becomes an empty ritual. To fail to perform our statutorily mandated review also raises serious due process problems. Here the death penalty has only been imposed 3 times in 27 similar cases. It has not generally been imposed. Therefore, I would vacate Benn's sentence because it is disproportionate.

II

OTHER ERRORS

The majority also makes several legal errors which could have major significance for future capital cases. Although these other matters do not affect the outcome of this

case, I write separately in the hope that the court will rectify these errors in the future.

A. Standard of Review.

The United States Supreme Court has repeatedly emphasized that the death penalty is fundamentally different from all other punishments because of its severity and finality. Murray v. Giarratano, 492 U.S. 1, 9, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989); Beck v. Alabama, 447 U.S. 625, 637, 65 L. Ed. 2d 392, 100 S. Ct. 2382, 2389-90 (1980). The finality of the death penalty requires "a greater degree of reliability when [it is] imposed." Lockett v. Ohio, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978).

In setting forth the standard of review in capital cases, the majority magnifies errors committed by the majority in State v. Lord, 117 Wn.2d 829, 888, 822 P.2d 177 (1991). See Majority, at 15-16. First, it states that assignments of error in the guilt phase of a capital case are reviewed in the same manner as noncapital case. As I noted in my dissent in State v.

Lord, supra at 925 n.39, the United States Supreme Court has employed heightened scrutiny to the guilt phase of a capital case. See Beck v. Alabama, 447 U.S. at 638, 100 S. Ct. at 2390. The reason for heightened scrutiny is that irregularities during the guilt phase can unfairly expose defendants to the ultimate punishment, the death penalty. Therefore, there is a corresponding need for reliability during the guilt phase of a capital case.

In addition, the majority undermines the heightened scrutiny of the sentencing phase of a capital case. It says that "while heightened scrutiny means a closer, more careful review of the record, it does not entail a raised standard of review." Majority, at 15 (citing Lord, 117 Wn.2d at 888). I cannot understand this argument. As an appellate court, it is our duty to review thoroughly the record in all cases that come before us, regardless of whether they are capital or non-capital. Significantly, the United States Supreme Court has never

indicated that heightened scrutiny simply means delving deeper into the details of the record.

Heightened scrutiny means something more. The federal constitution requires that we also determine that the procedures used meet the standard of increased reliability in capital cases. The United States Supreme Court has routinely treated capital defendants differently from noncapital defendants in its attempt to insure reliability of sentencing determinations. See, e.g., Beck v. Alabama, supra at 637-38 (holding that constitution required that jury be able to consider lesser included offenses in capital case, but indicating this requirement need not be extended to noncapital cases); Lockett v. Ohio, 438 U.S. 586, 604-05, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978) (holding that capital defendants must be allowed to present all mitigating evidence, while acknowledging legislation may limit evidence in a noncapital case). As Justice Harlan wrote:

> So far as capital cases are concerned, I think they stand on quite a different footing than

> other offenses. In such cases the law is especially sensitive to demands for that procedural fairness . . . I do not concede that whatever process is "due" an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, . . . nor is it negligible, being literally that between life and death.

Reid v. Covert, 354 U.S. 1, 77, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957). In effect, the Court employs a higher standard of review to insure the reliability of a death penalty determination. We must follow the United States Supreme Court by applying a higher standard of review to the guilt and penalty phases of a capital case.

B. Failure to Object at Trial

The majority suggests that a capital defendant may be precluded from raising an issue for the first time on appeal. Majority, at 53-54. It cites non-capital cases for the proposition that claims of instructional error that are not constitutional may not be raised for the first time on appeal. See State v. Fowler, 114 Wn.2d 59, 785 P.2d 808 (1990); State v. Scott, 110 Wn.2d 682, 689, 757 P.2d 492 (1988). The majority fails to discuss

that we allow capital defendants to challenge jury instructions on appeal even when they made no objection to the instructions at trial because of the severity of a death sentence. State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986).

The failure of the majority to follow federal constitutional principles in this and other cases may require reversal. It also is likely to prolong the length and add to the expense of capital cases.

/s/ UTTER, J.

/s/ I concur SMITH, J.

/s/ I concur JOHNSON, JJ.

[No. 61080-1. En Banc.]

In the Matter of the Personal Restraint of:

GARY BENN, Petitioner.

[1] Personal Restraint - Prejudice - Nature - Source. A petition for relief from personal restraint will not be granted unless the petitioner shows that he has been actually and substantially prejudiced either by the violation of a constitutional right or by a fundamental error of law.

[2] Personal Restraint - Scope - Issue Raised on Appeal - Test. A claim that was rejected on the merits on direct appeal may be renewed in a personal restraint petition only if a reexamination of the issue would serve the ends of justice.

[3] Personal Restraint - Scope - Issue Raised on Appeal - Promoting Justice - Test. In the absence of an intervening change in the law or another justifiable

reason, the ends of justice are not served by considering in a personal restraint petition a claim that was rejected on the merits on direct appeal.

[4] Personal Restraint - Scope - Issue Raised on Appeal - Newly Discovered Evidence - Time of Discovery. Newly discovered evidence provides a sufficient basis for a court to consider in a personal restraint petition a claim that was rejected on the merits on direct appeal only if the evidence could not have been discovered in time to be included in the record on appeal.

[5] Criminal Law - Right to Counsel - Effective Assistance of Counsel - Trial Strategy - Tactics. A defense attorney's decision that constitutes a trial tactic or strategy will not support a claim of ineffective assistance of counsel.

[6] Criminal Law - Punishment - Death Penalty - Review - Proportionality - Record on Review. When conducting proportionality review of a death sentence, the Supreme

Court considers all of the evidence in the record whether or not it was presented to the jury.

[7] Criminal Law - Right to Counsel - Effective Assistance of Counsel - Prejudice - Test. A defense counsel's deficient performance is not prejudicial unless it deprives the defendant of a fair trial (i.e., a trial in which the result is reliable).

[8] Criminal Law - Right to Counsel - Effective Assistance of Counsel - Conflict of Interest - Turning Away From Client - Misuse of Allocution Right. When a criminal defendant misuses the right of allocution to the detriment of the defense theory of the case, defense counsel's act of turning away from the client and the jury during allocution to conceal an angry response does not necessarily constitute a personal conflict of interest.

[9] Criminal Law - Right to Counsel - Effective Assistance of Counsel - Duty of Loyalty - In General. A criminal

defense attorney's duty of loyalty to a client is not breached so long as the attorney does not advocate against the client.

[10] Criminal Law - Right to Counsel - Effective Assistance of Counsel - Duty of Loyalty - Turning Away From Client - Misuse of Allocution Right. When a criminal defendant misuses the right of allocution to the detriment of the defense theory of the case, defense counsel's act of turning away from the client and the jury during allocution to conceal an angry response does not necessarily constitute a breach of counsel's duty of loyalty to the defendant.

[11] Criminal Law - Right to Counsel - Effective Assistance of Counsel - Duty of Loyalty - Breach - Determination - Trial Considered as a Whole. In deciding whether a criminal defense attorney has breached the duty of loyalty to a client by an act or omission at trial, a court considers the entire trial record.

[12] Criminal Law - Right to Counsel - Effective Assistance of Counsel - Test. The assistance of counsel provided to a criminal defendant satisfies the Sixth Amendment right to counsel unless the outcome of the proceedings is rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance.

[13] Criminal Law - Punishment - Death Penalty - Special Sentencing Procedure - Effective Assistance of Counsel - Test. In the penalty phase of a death penalty case, the assistance of counsel provided to the defendant satisfies the Sixth Amendment right to counsel unless counsel's performance is deficient and there is a reasonable probability that, but for counsel's deficient performance, the jury would have returned a verdict of "no" to the statutory question "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are

not sufficient mitigating circumstances to merit leniency?"

[14] Criminal Law - Punishment - Sentence - Right of Allocution - Scope - Limitation. The only legitimate purpose of allocution in a criminal trial is to express remorse and to ask for mercy.

[15] Criminal Law - Right to Counsel - Effective Assistance of Counsel - Turning Away From Client - Misuse of Allocution Right. When a criminal defendant misuses the right of allocution to the detriment of the defense theory of the case, defense counsel's act of turning away from the client and the jury during allocution to conceal an angry response does not necessarily constitute ineffective assistance of counsel in violation of the Sixth Amendment right to counsel.

[16] Criminal Law - Right to Counsel - Effective Assistance of Counsel - Trial Strategy - Following Client's Instructions. A tactical decision made by a criminal

defense attorney incident to the defendant's express instructions regarding trial strategy will not support a claim of ineffective assistance of counsel.

[17] Homicide - Self-Defense - Proof - Victim's Reputation for Violence. Evidence of a homicide victim's reputation for violence may not be admitted to establish a claim of self-defense; such evidence may be admitted in support of a self-defense claim only if sufficient evidence has been presented that the victim's conduct justified the defendant's use of deadly force.

[18] Criminal Law - Evidence - Character Evidence - Good Character - Reputation for Nonviolence. Because the character of a defendant charged with murder is not an essential element of the crime, even if the defendant claims self-defense, evidence of the defendant's reputation for nonviolence may not be admitted under ER 405(b) to prove he acted in self-defense.

[19] Criminal Law - Evidence - Character Evidence - Good Character - Purpose. Evidence of a criminal defendant's good character is admissible under ER 405(a)(1) only to the extent it supports an inference that it is unlikely or improbable that the defendant committed the act charged.

[20] Criminal Law - Right to Counsel - Effective Assistance of Counsel - Failure To Produce Promised Witness - Defendant as Witness - Change of Mind. A criminal defense attorney's failure to produce a promised witness does not constitute ineffective assistance of counsel if the witness is the defendant, the defendant has had a change of mind about testifying, and the attorney fully expected the defendant to testify when the promise was made.

[21] Criminal Law - Punishment - Death Penalty - Insanity - Determination - Scope of Inquiry - Duty of Defense Counsel. An attorney representing a defendant charged

with a capital crime is not required to conduct an exhaustive investigation into the defendant's competency or to call all possible witnesses on the question; counsel is required only to conduct a reasonable inquiry.

[22] Criminal Law - Evidence - Character Evidence - Bad Character - Review - Harmless Error. The erroneous admission of evidence of a criminal defendant's bad character does not violate the defendant's due process right unless the evidence is irrelevant and extremely prejudicial and would be viewed by the jury as showing a propensity to commit the crime charged.

[23] Criminal Law - Discovery - Timeliness - Tardy Disclosure - Harmless Error - Insufficient Proof. The State's untimely response to a criminal defendant's discovery request is not prejudicial if the information sought to be obtained would not have proved the point for which the discovery request was made.

[24] Criminal Law - Discovery - Timeliness - Tardy Disclosure - Harmless Error - Other Available Sources. The State's untimely response to a criminal defendant's discovery request is not prejudicial if the information sought to be discovered could have been obtained from other sources that were readily available to the defense.

[25] Personal Restraint - Scope - Issue Raised on Appeal - Revision of Claims. A claim rejected on direct appeal may not be renewed in a personal restraint petition simply by recasting the argument or couching the argument in different language.

[26] Prisons - Searches and Seizures - Expectation of Privacy - Jail Inmate - Another Inmate's Possessions. A jail inmate does not have an expectation of privacy in the contents of another inmate's cell or in items given to another inmate; nor does the inmate have standing to challenge the seizure of such contents or items.

[27] Criminal Law - Right to Counsel - Effective Assistance of Counsel - Failure To Move To Suppress - Evidence Not Admitted. A criminal defense attorney's failure to challenge the validity of a search does not constitute ineffective assistance of counsel if nothing seized in the search is admitted against the defendant at trial.

[28] Criminal Law - Evidence - Preservation - Failure of State - Test. A criminal defendant's due process right is not violated by the State's loss or destruction of evidence unless the evidence is favorable to the defendant and material either to the defendant's guilt or punishment.

[29] Criminal Law - Punishment - Death Penalty - Special Sentencing Procedure - Trial Court's Report - Description of Crime - Review. A trial court's description of an aggravated first degree murder as "horrible" and "brutal" in the report required by RCW

10.95.120 is not prejudicial if the description is supported by the evidence in the record.

[30] Criminal Law - Punishment - Death Penalty - Special Sentencing Procedure - Trial Court's Report - Description of Defendant - Review. A trial court's characterization of the credibility of a defendant convicted of aggravated first degree murder in the report required by RCW 10.95.120 is not subject to review.

[31] Criminal Law - Informant - Inmate Informant - Agency Relationship - Test. A jail inmate does not have an agency relationship with a law enforcement organization to inform on another inmate unless there is at least an implicit agreement between them, made beforehand, for such services to be rendered and the organization has the ability to control the circumstances under which the information is acquired. Although each of the following factors is evidence of an agency

relationship, no single one is dispositive: (1) an existing relationship between the informant and the organization, (2) the informant has previously been an informant, and (3) the informant has received some benefit for informing on the other inmate.

[32] Criminal Law - Informant - Inmate Informant - Agency Relationship - Known Benefits of Informing - Effect. A jailhouse informant's understanding, either from past conduct as an informant or from the jail environment, that cooperation with law enforcement authorities may prove beneficial does not necessarily make the informant an agent of law enforcement.

[33] Criminal Law - Witnesses - Cross-Examination - Scope - Improper Limitation - Harmless Error - Factors. Whether a trial court's improper denial of a criminal defendant's opportunity to impeach a witness constitutes reversible error depends upon (1) the importance of the witness's testimony to the State's

case, (2) the presence or absence of evidence corroborating or contradicting the witness's testimony on material points, (3) the extent of cross-examination otherwise permitted, and (4) the overall strength of the State's case.

[34] Criminal Law - Discovery - Failure To Disclose - Harmless Error - Test. A criminal defendant's due process right is not violated by the State's failure to disclose an item of evidence unless the evidence is favorable to the defendant and material either to the defendant's guilt or punishment.

[35] Criminal Law - Discovery - Failure To Disclose - Materiality - What Constitutes. For purposes of determining whether a criminal defendant has been prejudiced by the State's failure to disclose an item of evidence, the undisclosed evidence is "material" only if there is a reasonable probability the result of the trial would have been different had the evidence been

disclosed. The reasonable probability standard refers to whether the defendant received a fair trial (i.e., a trial resulting in a verdict worthy of confidence) in the absence of the undisclosed evidence.

[36] Criminal Law - Discovery - Failure To Disclose - Alternative Sources - Reasonable Diligence. A criminal defendant's due process right is not violated by the State's failure to disclose an item of evidence if the defendant, in the exercise of reasonable diligence, could have obtained the information at issue.

[37] Criminal Law - Right to Counsel - Effective Assistance of Counsel - Failure To Pursue Peripheral Issue. A criminal defense attorney's failure to pursue an issue peripheral to the State's case will not support a claim of ineffective assistance of counsel.

[38] Criminal Law - Trial - Misconduct of Prosecutor - Argument - Defendant as Liar. A prosecutor's statement at trial that the defendant is a "liar" is not improper

where the statement is a permissible inference from the evidence and echoes defense counsel's admission that the defendant lied to police.

[39] Criminal Law - Trial - Time of Trial - Constitutional Right - Factors. A criminal defendant's claimed violation of the constitutional right to a speedy trial is evaluated in light of (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant.

[40] Criminal Law - Trial - Presence of Defendant - Right To Be Present - Test. The constitutional right of a criminal defendant to be present at all critical stages of the proceedings does not attach to a proceeding at which no evidence is being presented, the admissibility of evidence or the availability of a defense or theory of the case is not being determined, and the defendant's presence does not have a reasonably substantial relation to a full opportunity to defend against the charge.

[41] Criminal Law - Trial - Presence of Defendant - Right To Be Present - Scope - Chamber Meetings and Sidebars. A criminal defendant does not have a right to be present during in-chamber or bench conferences between the trial court and counsel on legal matters.

[42] Criminal Law - Trial - Presence of Defendant - Right To Be Present - Scope - Hearing on Motion for Continuance. A criminal defendant does not have a right to be present during a hearing on a motion for a continuance if no factual issues are in dispute.

[43] Criminal Law - Trial - Presence of Defendant - Right To Be Present - Review - Harmless Error. The violation of a criminal defendant's constitutional right to be present at all critical stages of the proceedings is subject to harmless error analysis.

[44] Criminal Law - Punishment - Death Penalty - Special Sentencing Procedure - Instructions - Validity - Test. An instruction given in the penalty phase of a capital

case is invalid only if there is a reasonable likelihood that the jury applied the instruction in an unconstitutional or improper manner.

[45] Criminal Law - Punishment - Death Penalty - Special Sentencing Procedure - Instructions - Validity - Considered as a Whole. A challenged instruction in the penalty phase of a capital case is examined in the context of the entire set of instructions given to the jury.

[46] Criminal Law - Plea of Guilty - Validity - Collateral Attack - Time Limitation. A collateral attack on the validity of a guilty plea is subject to the one-year time limitation prescribed by RCW 10.73.090 and .130 if none of the exceptions in RCW 10.73.090 applies.

[47] Criminal Law - Plea of Guilty - Validity - Collateral Attack - Violation of Court Rule. The entry of a guilty plea in violation of a court rule does not warrant relief from personal restraint unless the plea is constitutionally infirm.

[48] Criminal Law - Plea of Guilty - Voluntariness - Nature of Charge - Inference From Representation by Presumptively Competent Counsel. A criminal defendant's understanding of the nature of the charged crime may be assumed from the defendant's representation by presumptively competent counsel.

[49] Criminal Law - Punishment - Death Penalty - Insanity - Time of Punishment - Eighth Amendment - Test. For purposes of the Eighth Amendment prohibition on executing convicts who are insane, a convict condemned to death is "insane" only if the convict is unaware of the punishment about to be suffered and the reason why it is to be suffered.

[50] Criminal Law - Punishment - Death Penalty - Insanity - Time of Punishment - State Constitution - Test. For purposes of the Const. art. I, § 14 prohibition on cruel punishments, a convict condemned to death is competent to be executed if, at the time of punishment,

the convict understands the peril of the situation and is able to communicate rationally with counsel.

[51] Criminal Law - Punishment - Death Penalty - Special Sentencing Procedure - Validity - In General. In general, the special sentencing procedure of (RCW10.95) for imposing the death penalty on offenders convicted of aggravated first degree murder is constitutional.

[52] Criminal Law - Punishment - Death Penalty - Review - Proportionality - Supreme Court's Procedure - Validity. The Supreme Court's procedure for reviewing a death sentence for comparative proportionality as mandated by RCW 10.95.130(2)(b) satisfies constitutional due process requirements so long as the procedure is undertaken in good faith.

[53] Criminal Law - Punishment - Death Penalty - Review - Proportionality - Similar Cases - Preliminary Determination - Necessity. In conducting comparative

proportionality review of a death sentence as mandated by RCW 10.95.130(2)(b), the Supreme Court is not required to preliminarily review the cases that might be thought similar to the case at bar, provide counsel with notice of those cases, allow briefing on the subject, and then conduct further proportionality review based on that briefing.

[54] Criminal Law - Punishment - Death Penalty - Review - Proportionality - Similar Cases - Precise Uniformity. Comparative proportionality review of a death sentence as mandated by RCW 10.95.130(2)(b) is not soluble in precisely quantifiable terms. Instead, comparative proportionality review involves the exercise of discretion and judgment.

[55] Criminal Law - Punishment - Death Penalty - Special Sentencing Procedure - Mitigating Circumstances - Instructions - Statutory Circumstances - Full List - Evidentiary Support - Necessity. In the penalty phase of

a capital case, the jury may be instructed on all of the mitigating circumstances listed in RCW 10.95.070--as nonexclusive examples of relevant factors--whether or not they are supported by the evidence in the record.

[56] Criminal Law - Punishment - Death Penalty - Special Sentencing Procedure - Mitigating Circumstances - Statutory Query - Instruction - Sufficiency. An instruction in the penalty phase of a capital case advising the jury that, with respect to the question of whether there are sufficient mitigating circumstances to merit leniency, a unanimous "yes" vote will result in a death sentence and a unanimous "no" vote or an inability to agree on a unanimous answer will result in a life sentence without the possibility of parole satisfies the constitutional standard of instructional sufficiency (i.e., the instruction is valid if it is neither confusing nor misleading).

[57] Criminal Law - Insanity - Competency To Stand Trial - Fabricated Mental Defect. A fabricated mental defect will not support a finding of incompetency to stand trial.

[58] Criminal Law - Punishment - Death Penalty - Special Sentencing Procedure - Right to Jury - Waiver - Consent by State - Validity. Because a criminal defendant does not have a right to a nonjury trial, that portion of RCW 10.95.050(2) under which a defendant in the penalty phase of a capital case may not waive a jury trial without the State's consent does not violate the equal protection rights of capital defendants.

[59] Criminal Law - Punishment - Cruel and Unusual Punishment - Hanging. Death by hanging does not constitute cruel and unusual punishment.

[60] Criminal Law - Punishment - Cruel and Unusual Punishment - Standing To Challenge - Election - Necessity. A capital defendant who has not elected

hanging as a method of execution does not have standing to challenge that method as cruel and unusual punishment.

[61] Criminal Law - Punishment - Death Penalty - Special Sentencing Procedure - Notice - Service - On Defense Counsel - Validity. The notice of special sentencing proceedings required by RCW 10.95.040 may be served upon a defendant's attorney in lieu of personal service on the defendant.

[62] Personal Restraint - Petition - Transfer to Superior Court - Reference Hearing - Nature of Evidence. Incompetent and inadmissible evidence may not be presented in a personal restraint reference hearing.

[63] Personal Restraint - Petition - Transfer to Superior Court - Reference Hearing - Specific Questions - Scope of Evidence. A court conducting a personal restraint reference hearing constituted to resolve certain

specified questions may exclude any evidence that is irrelevant to those questions.

[64] Witnesses - Impeachment - Effect - Substantive Proof. Impeaching evidence merely negates a witness's testimony; it may not be used to provide substantive support for a proposition in dispute.

[65] Personal Restraint - Petition - Transfer to Superior Court - Reference Hearing - Discovery - Prosecutorial Work Product. A prosecuting attorney's work product is not subject to disclosure in a reference hearing on a capital defendant's personal restraint petition if the defendant has not shown a substantial need for the disclosure thereof. A substantial need is not established if the prosecutor is either available to testify or testifies at the hearing.

[66] Personal Restraint - Scope - Perjured Testimony - Knowing Use - Necessity. A criminal conviction may not be collaterally attacked on the basis that it was

supported by perjured testimony unless the perjured testimony was knowingly used by the State to obtain the conviction.

[67] Courts - Stare Decisis - Federal Court Holding – Ninth Circuit Court of Appeals. The Supreme Court is not bound by constitutional holdings of the Ninth Circuit Court of Appeals.

[68] Personal Restraint - Scope - Perjured Testimony - Knowing Use - Prejudice - Necessity. A criminal conviction supported by knowingly perjured testimony will be upheld unless there is a reasonable likelihood the false testimony could have affected the judgment of the jury.

[69] Personal Restraint - Petition - Motion To Supplement - Timeliness. A motion to supplement a personal restraint petition does not relate back to the filing of the original petition and is subject to the one-year time limitation

prescribed by RCW 10.73.090 and .130 if none of the exceptions in RCW 10.73.100 applies.

[70] Limitation of Actions - Waiver - By Appellate Court. A statutory time limitation may not be waived or altered by an appellate court under RAP 18.8(a).

[71] Personal Restraint - Petition - Timeliness - Statutory Limits - Exceptions - Significant Change in Law - Self-Defense Instruction. For purposes of RCW 10.73.100(6), under which a postconviction claim based on a significant change in the law is exempt from the one-year time limitation of RCW10.73.090, the rule stated in State v. LeFaber, 128 Wn.2d 896 (1996) regarding the validity of self-defense instructions does not constitute a significant change in the law.

[72] Criminal Law - New Principle of Law - Retroactivity - Cases Already Final. A new rule of criminal procedure should not be applied retroactively to cases on collateral review unless (1) the rule places certain kinds of

conduct beyond the power of the State to proscribe or punish or (2) the rule establishes procedures inherent in the concept of ordered liberty.

[73] Personal Restraint - Prejudice - Instructional Error - Burden of Proof. Prejudice is not presumed when the validity of an instruction is challenged in a personal restraint proceeding; in order to prevail, the petitioner must show that the erroneous instruction resulted in actual and substantial prejudice.

JOHNSON and SANDERS, JJ., dissent by separate opinion.

Nature of Action: An offender convicted of two counts of aggravated first degree murder and sentenced to death sought relief from personal restraint. The judgment and sentence were affirmed at 120 Wn.2d 631 (1993).

Superior Court: In a reference hearing ordered by the Supreme Court to answer three specific questions, the Superior

Court for Pierce County, No. 88-1-01280-8, Karen L. Strombom, J., on March 6, 1996, after taking a substantial amount of testimony, found that (1) there was no understanding between state officers and a testifying jail inmate regarding the inmate's dealings, relationship, or contacts with the petitioner while the two were together in jail; (2) the testifying inmate had told an informant that he was testifying on behalf of the State in a murder trial and that he was getting paid for the testimony; and (3) one of the petitioner's trial attorneys had reacted to the petitioner's allocution at trial by turning his back to the petitioner and the jury to conceal his anger from the jury, some of the jurors had noticed the attorney's reaction (although at least one juror attributed the conduct to cocounsel), and none of the petitioner's appellate counsel was aware of the incident until after oral argument on direct appeal.

Supreme Court: Holding that none of the many claims raised by the petitioner was sufficient to grant relief from

personal restraint and that additional claims raised in a supplemental petition were time barred, the court denies the petition.

David Zuckerman and Suzanne Lee Elliott, for petitioner.

John W. Ladenburg, Prosecuting Attorney, and Barbara L. Corey-Boulet and Mark Von Wahlde, Deputies, for respondent.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of	)	NO. 61080-1
GARY BENN,	)	EN BANC
Petitioner.	)	Filed _____

[As amended by order of the Supreme Court April 29, 1998, changing the dissenting opinion.]

GUY, J. - Defendant Gary Benn has been convicted of two counts of aggravated first degree murder and sentenced to death. We earlier affirmed those convictions and sentence. *State v. Benn*, 120 Wn.2d 631, 845 P.2d 289 (1993). In this personal restraint petition, the defendant renews some of the issues rejected on direct appeal and raises several new issues. After this court considered the personal restraint petition, the defendant filed a motion to supplement the petition. We deny both the motion to supplement and the personal restraint petition as to all claims.

FACTS

Gary Benn's half brother, Jack Dethlefsen, and long-time friend, Mike Nelson, were shot to death in Mr. Dethlefsen's home on the afternoon of February 10, 1988. Mr. Benn initially denied any involvement in the murders but later made incriminating statements to a fellow jail inmate, his brother, and a friend. Defense counsel conceded in opening statement that Mr. Benn had killed Jack Dethlefsen and Mike Nelson and explained that the issues for the jury would be whether the defendant had acted with premeditated intent to kill and whether the killings were part of a common scheme or plan. The State presented evidence of three possible motives for the murder: (1) the defendant feared the victims were going to report his involvement in an insurance fraud scheme involving a fire in, and burglary of, his trailer; (2) the defendant was angry that Jack Dethlefsen had removed the defendant as a beneficiary from his will and named William

Hastings in his place; and (3) the defendant believed Jack Dethlefsen was harassing his former girl friend.

Additional circumstances regarding the murders, the police investigation, and the defendant's trial are described in detail below in connection with the particular legal issues to which these facts are relevant.

Appeal and Personal Restraint Petition. We affirmed the defendant's convictions and death sentence in February 1993. The Supreme Court denied certiorari on November 1, 1993. On December 2, 1993, we appointed counsel to represent the defendant in a personal restraint proceeding. We subsequently granted counsels' motion for funds to hire an investigator. Counsel filed a personal restraint petition for the defendant in August 1994,[1] renewing some of the issues rejected on appeal and raising several additional issues, including claims of newly discovered evidence regarding informant Roy Patrick (to whom the defendant allegedly

[1] The petition was properly filed within the time required by RCW 10.73.090.

confessed while in jail) and regarding a 1987 investigation of a fire at the defendant's trailer. Appended to the petition are Detective Reinicke's report on the investigation of the fire and the fire marshal's affidavit relating his conclusion that the fire was accidental. There are also various documents appended to the petition regarding Jack Dethlefsen's criminal history and reputation for violence, Roy Patrick's criminal history, the defendant's mental state before and during trial, and defense counsel Raymond Thoenig's representation at trial. On this last point, one of the jurors submitted an affidavit stating that when the defendant began his allocution, Mr. Thoenig turned his back on Mr. Benn and the jury and appeared to be angry. The defendant's brother, Monte Benn, also recalled Mr. Thoenig turning away from the defendant "apparently in frustration or anger" as the defendant began his statement to the jury. App. to Pet. Ex. 4 at 5.

Also appended to the petition is the affidavit of one of the defendant's personal restraint petition attorneys, Charlotte

Cassady, who interviewed Roy Patrick in June 1993. Mr. Patrick reportedly told her that "informants were placed in cells with inmates by the police 'all the time.'" App. to Pet. Ex. 7 at 1. Ms. Cassady then asked Mr. Patrick if the police had asked him to elicit information from the defendant or had he just happened on the information after befriending Mr. Benn. Mr. Patrick said he could not remember whether the police had asked him to get information from the defendant. When pressed, Mr. Patrick told Ms. Cassady that this was "just a technicality" and "didn't mean anything," and that Mr. Benn "deserved what happened" and "didn't deserve to get off on a technicality." App. to Pet. Ex. 7 at 2.

Pierce County Corrections Officer Minker provided the defendant's attorneys with an affidavit claiming that "on occasions in the past, known snitches have been placed in tanks intentionally to elicit information from a particular prisoner." App. to Pet. Ex. 45 at 1. According to Officer Minker, "[w]hen this has occurred, a detective has contacted the sergeant or

lieutenant in charge of classifications and asked that the snitch be placed in a certain locale." App. to Pet. Ex. 45 at 1. Officer Minker testified he knew this "because I have overheard conversations between the classifications sergeant or lieutenant in which s/he has told the programs/classification officers to place a snitch/inmate in a special locale to get information from a particular prisoner." App. to Pet. Ex. 45 at 2. Officer Minker did not say how frequently this occurred or whether Roy Patrick was deliberately placed with the defendant.

Defense counsel also obtained Roy Patrick's booking record, which shows he was booked into the Pierce County jail on September 14, 1988, and released on January 25, 1989. This document states that Mr. Patrick had high blood pressure and had suffered a stroke at St. Joseph's Hospital four months prior to his incarceration. There is also a jail report in which an officer stated that he observed inmate Patrick lying on his bunk having what appeared to be convulsions. The report states the

officer called medical personnel, but there is no mention of what treatment Mr. Patrick received.

Defense counsel provided this information regarding Mr. Patrick's medical history to Dr. Teresa Murphy. Dr. Murphy then signed a declaration stating that it was reasonable to expect that Mr. Patrick had decreased cognitive function, including both long- and short-term memory loss, when he was incarcerated with the defendant and gave his statement to the police. Dr. Murphy expressed no opinion regarding Mr. Patrick's mental condition at the time of the defendant's trial.

Also appended to the petition is the declaration of Melvin Stevens, an informant whose tip supported a warrant to search Roy Patrick's motel room during the defendant's trial. Mr. Stevens claimed that he often saw Mr. Patrick smoke marijuana and also saw him smoke cocaine. According to Mr. Stevens, Mr. Patrick told him "the man charged with murder had not done what he intended to testify that he had done." App. to Pet. Ex. 42 at 1. Mr. Stevens also stated that Mr.

Patrick told him that "a lawyer or somebody" was paying him (Patrick) $10,000 for testifying. App. to Pet. Ex. 42 at 1.

In July 1995, we considered the defendant's personal restraint petition and transferred the case to the superior court for an evidentiary hearing and entry of findings of fact limited to the following questions:

(1) What understanding, if any, was there between state officers and Roy Patrick regarding Patrick's relationship, dealings or contacts with the defendant while the two were held in the county jail?

(2) What, if anything, did Roy Patrick tell Melvin Stevens regarding the testimony Patrick planned to give when called as a witness at the defendant's trial?

(3) Did attorney Raymond Thoenig perceptibly react to the defendant's allocution; if so, did the jurors observe or respond to that reaction and when did the defendant or his attorney learn of Mr. Thoenig's reaction?

Reference Hearing. The superior court heard prehearing motions to determine the proper scope of the hearing. The State took the position that the evidence should be limited to the three questions set forth in the remand order, and that each of those questions related to one specific claim the defendant had raised in his personal restraint petition. Defense counsel, however, argued that the defendant should be permitted to explore such other, related issues as may be revealed by the testimony. They also interpreted the first question to relate not only to the admissibility of the defendant's alleged statement to Mr. Patrick, but also to the defendant's claims of prosecutorial misconduct and ineffective assistance. The superior court ultimately heard testimony from about 50 witnesses, including Roy Patrick, Melvin Stevens, three of the attorneys who represented the defendant at trial, several prosecuting attorneys, the trial judge, all of the jurors who could be located, Monte Benn, and numerous police officers and jailers.[2]

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[2] The transcript of the reference hearing is more than 2,500 pages--slightly longer than the trial transcript.

The superior court subsequently entered detailed findings of fact to the following effect: Roy Patrick worked as an informant with Tacoma Police Detective Ron Lewis in 1988. That relationship ended by May 1988. Mr. Patrick did not work as an informant for anyone between May 1988 and June 1989. Commencing in June 1989, Mr. Patrick began working as an informant for State Patrol Officer Padukiewicz, who was then assigned to TNET (an inter-agency drug task force). This relationship ended November 2, 1989. Mr. Patrick was paid by the Tacoma Police Department and TNET for providing useful information. No law enforcement officer or prosecuting attorney had requested or directed that the defendant be placed in any particular unit in the jail. His placement in the same unit as Mr. Patrick was the result of coincidence, not design. The discussions between Mr. Patrick and the defendant were not initiated at the direction or under the guidance of any state officer. Mr. Patrick, who was in jail awaiting sentencing on an arson conviction, knew from his

experience as an informant that he could work out a deal if he had information of interest to law enforcement. He believed he could obtain a reduction in his forthcoming sentence by providing the information he learned from the defendant. In exchange for that information, the prosecutor did recommend a three-month shorter sentence than originally agreed. The court followed this recommendation. As a result, Mr. Patrick was released from jail on the date of his sentencing.

In answer to the three specific questions framed in the remand order, the superior court found:

(1) There was no understanding between state officers and Roy Patrick regarding Mr. Patrick's dealings, relationship, or contacts with the defendant while the two were held together in the jail;

(2) Roy Patrick told Melvin Stevens that he was testifying on behalf of the State in a murder trial and that he was getting paid;

(3) Defense counsel Thoenig perceptibly reacted to the defendant's allocution by turning his back to the defendant and the jury to conceal his anger from the jury; and some of the jurors noticed Mr. Thoenig's reaction, though at least one attributed the conduct to his cocounsel. The parties stipulated that none of defendant's appellate counsel was aware of the incident until after oral argument on direct appeal.

The defendant has filed in this court a "supplemental brief" challenging the superior court's findings of fact and raising additional issues he contends are supported by the evidence presented at the reference hearing.[3] More recently, as noted above, he moved to supplement his personal restraint petition to claim that the trial court's instruction on self-defense

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[3] Except as to the three issues for which the hearing was ordered and any new grounds for relief which come within RCW 10.73.100, the claims raised in this supplemental brief are barred by the statute of limitation, RCW 10.73.090http://www.mrsc.org/mc/rcw/rcw 10 title/rcw 10 . 73 chapter/rcw 10 . 73 .090.htm. It is unnecessary to further identify the untimely claims because we find all of the defendant's claims to be without merit. Our rejection of some untimely issues on the merits should not be taken to imply that we would, or could, disregard the statute of limitation in order to grant relief based on a time-barred claim.

is erroneous under *State v. Hutchinson*, 85 Wn. App. 726, 938 P.2d 336 (1997) and *State v. LeFaber*, 128 Wn.2d 896, 913 P.2d 369 (1996), and that trial counsel represented him ineffectively by requesting the erroneous language.

ANALYSIS

Standard of Review. To obtain relief in this personal restraint petition, the defendant must show he was actually and substantially prejudiced either by a violation of his constitutional rights or by a fundamental error of law. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994); *In re Personal Restraint of Rice*, 118 Wn.2d 876, 884, 828 P.2d 1086 (1992); *In re Personal Restraint of St. Pierre*, 118 Wn.2d 321, 329, 823 P.2d 492 (1992); *In re Personal Restraint of Hews*, 99 Wn.2d 80, 87, 660 P.2d 263 (1983); *In re Personal Restraint of Cook*, 114 Wn.2d 802, 810, 792 P.2d 506 (1990). Additionally, in order to renew any claim that was rejected on the merits on appeal, the defendant must show that the ends of justice would be served by reexamining the issue.

In re Personal Restraint of Vandervlugt, 120 Wn.2d 427, 432, 842 P.2d 950 (1992);. *In re Personal Restraint of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986); *Sanders v. United States*, 373 U.S. 1, 16, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963).

Effective Assistance of Counsel. The defendant contends his various attorneys represented him ineffectively during the 30-day period when the prosecutor was deciding whether to seek the death penalty and also during both phases of trial.

The defendant also made an ineffective assistance claim on appeal. We held that he "was not denied effective assistance of counsel prior to the filing of the notice to seek a special sentencing proceeding." *Benn*, 120 Wn.2d at 665. We also rejected his contention that counsel represented him ineffectively in the penalty phase. *Benn*, 120 Wn.2d at 666. On both points, we held the defendant failed to show either deficient performance on counsels' part or prejudice flowing from the alleged errors or omissions. *Benn*, 120 Wn.2d at 665-

66. The defendant points to no intervening change in the law or other reason to justify reconsidering our holding regarding counsels' pretrial performance. We adhere to our conclusion that the defendant was not prejudiced by counsels' actions while the prosecutor was deciding whether to seek the death penalty.

With respect to his representation in the penalty phase, the defendant responds to our statement that appellate counsel "fail[ed] to suggest any additional mitigation evidence counsel could have offered . . . ." *Benn*, 120 Wn.2d at 666, by claiming that counsel should have presented additional evidence regarding his mental state at the time of the killings. He faults counsel for failing to call Dr. Lloyd Cripe to testify that the defendant acted in a "knee-jerk" manner and for failing to call Dr. Brett Trowbridge to testify that the defendant suffered from a paranoid delusion. He also contends his brother, Monte Benn, would have been a useful witness on this issue.

Viewed expansively, the defendant's current argument could be read to include a claim of newly discovered evidence made in support of a claim of ineffective assistance of counsel. Newly discovered evidence would justify a prisoner's failure to raise an argument earlier; this is in fact a separate ground for obtaining relief in a personal restraint petition. *In re Personal Restraint of Lord*, 123 Wn.2d at 319; RAP 16.4(c)(3). When raised as a separate ground for relief, "newly discovered evidence" has the same meaning as in a motion for a new trial. *In re Personal Restraint of Lord*, 123 Wn.2d at 319. *In re Personal Restraint of Lord* requires a defendant to show, among other things, that the evidence was discovered "since the trial" and could not have been discovered "before trial" in the exercise of due diligence. *Id.* at 319-20 (citing *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981)). When a defendant is claiming that newly discovered evidence justifies reconsidering an issue rejected on appeal, however, the

defendant must show the evidence could not have been discovered in time to be included in the record on appeal.

The defendant has not shown that there is any "new" evidence regarding his mental state which counsel should have offered in mitigation at the penalty phase. The defendant's brother, Monte Benn, made a statement well before trial referring to the defendant's "multiple depressive episodes." Clerk's Papers at 78.[4] The defendant was sent to Western State Hospital for a competency evaluation in the summer of 1989. Clinical psychologist Carl Redick concluded that the defendant was not suffering from a major mental disease or defect and was competent to stand trial. Dr. Redick's report was completed in August 1989. At about the same time, independent defense expert Dr. Herbert Marra, a clinical psychologist, found the defendant to be "unequivocally competent." Clerk's Papers at 280. Dr. Redick again examined the defendant during voir dire, as did Dr. Cripe. Both

[4] All references to Clerk's Papers refer to those clerk's papers filed in the direct appeal under cause number 57272-1.

concluded that the defendant was competent to continue with trial. The defendant also underwent a third series of examinations near the end of the State's case in chief. Dr. Cripe found that the defendant was "currently incompetent to aid his counsel" and recommended that trial be discontinued for perhaps two weeks while the defendant received medication. Clerk's Papers at 537.[5] Dr. Redick concluded that the defendant was "exaggerating and malingering" and was still competent. Clerk's Papers at 540. Dr. Trowbridge felt the defendant was competent to continue with the guilt phase but was not then competent to proceed with the penalty phase. Report of Proceedings at 1730. Both Dr. Cripe and Dr. Trowbridge concluded that the defendant was suffering from a delusion that "Pete"[6] would kill the defendant's family if he

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[5] Dr. Cripe adheres to his opinion that at the time of the murders the defendant acted impulsively rather than in a cold, calculated, deliberate manner.

[6] "Pete" (Walter Peter Hartman) was not identified as a witness prior to trial because the State was unable to identify or, therefore, locate him until most of the prosecution witnesses had testified. Mr. Hartman corroborated Roy Patrick's testimony that the defendant attempted to hire Mr. Hartman to kill Jack Dethlefsen.

testified. Report of Proceeding at 1724. Dr. Trowbridge explained that the delusion was a way for the defendant's unconscious to deal with the fact that the evidence of his guilt left him with no good options. Report of Proceedings at 1738.

In light of the extensive evidence presented at trial regarding the defendant's mental state, the materials he now offers do not constitute "newly discovered evidence" under any definition.

Regarding trial counsels' performance, counsel was aware of the available evidence of the defendant's mental state and devised a reasonable strategy to deal with it. Counsel first moved for a directed verdict in the penalty phase on the ground that the psychiatric evidence was so mitigating as to demand leniency. When that motion was denied, counsel realized that presenting psychological evidence in mitigation would open the door to damaging rebuttal. The State would have been entitled to cross-examine defense witnesses and introduce relevant evidence to rebut the defendant's evidence so that the

jury received a balanced and complete picture. *State v. Lord*, 117 Wn.2d 829, 890, 822 P.2d 177 (1991). This means the jury could have heard Dr. Trowbridge's opinion that the defendant's delusion regarding "Pete" was a way for the defendant to deal with the fact that the evidence of his guilt left him with no good options. The State also could have called Dr. Redick to relate his conclusion that the defendant was fabricating or exaggerating the symptoms upon which Drs. Cripe and Trowbridge based their opinions. Instead of inviting such damaging evidence, counsel elected to portray the defendant as having no serious mental problems and therefore as not dangerous.

Thus, counsels' failure to present the additional evidence regarding the defendant's mental state does not demonstrate that counsels' performance was so ineffective as to violate the Sixth Amendment. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The fact that all of these experts' opinions were in the record before this court on appeal is relevant to another aspect of the defendant's ineffective assistance claim. The defendant contends our proportionality review would have had a different outcome if the psychiatric evidence had been presented. That evidence was part of the record on appeal, however, whether or not it was presented to the jury.

The defendant also contends his counsel advocated against him in the penalty phase by failing to request a competency evaluation before the penalty phase. We disagree. As discussed above, the defendant underwent competency evaluations by Dr. Redick and Dr. Marra about seven months before trial. Both concluded the defendant was competent at that time. In January 1990, the trial court entered an order directing that the defendant be provided mental health counseling throughout the trial. This counseling was provided by Dr. Charles Anderson, the consulting psychiatrist at the Pierce County jail.

As trial began that March, defense counsel Thoenig informed the court in a closed hearing that the defendant's mental condition had deteriorated and he was no longer competent. The court directed that the defendant be examined in the jail by Drs. Redick and Cripe. Both psychologists concluded that the defendant was competent to proceed with trial.

After the prosecution identified Walter Peter Hartman as the man other witnesses had known or heard of only as "Pete," defense counsel requested that the court again inquire into the defendant's competency due to the defendant's reaction to the knowledge that Mr. Hartman would be testifying. The court ordered the defendant to be reexamined by Drs. Cripe and Redick, and also by Dr. Trowbridge. After hearing their testimony, the court found that the defendant was "exaggerating and malingering" and was still competent. Report of Proceedings at 1790. There is no evidence that his condition worsened after the guilt phase so as to give the trial

court any reason to reconsider that finding. Thus, counsels' failure to request another competency hearing did not "deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

The defendant also complains that counsel acceded to his request to obtain the court's permission for him to represent himself in the penalty phase. That request was ultimately of no import. The defendant changed his mind before the penalty phase commenced and was represented by counsel throughout both phases of trial.

With respect to defense counsel's actions during the defendant's allocution, the superior court found at the reference hearing that defense counsel Thoenig became angry and turned away from the defendant when the defendant began his statement to the jury. Counsel's reaction was a response to the defendant's misuse of his right of allocution. "Allocution is a plea for mercy; it is not intended to advance or dispute facts." *Lord*, 117 Wn.2d at 897 (also holding that defendant may be

cross-examined if he goes beyond plea for mercy and discusses the crime itself); *State v. Mak*, 105 Wn.2d 692, 729, 718 P.2d 407 (1986). The defendant's attorneys explained this limitation to him. Mr. Thoenig reacted when the defendant disregarded his attorneys' advice and began his "allocution" by saying "the truth never came into this trial. I was convicted by three false witnesses," and then proceeded to give unsworn testimony as to his version of events. Report of Proceedings at 2278. Mr. Thoenig's reaction to the defendant's statement was to turn away from the defendant and the jury. The defendant contends Mr. Thoenig thereby violated his duty of loyalty and that prejudice should therefore be presumed.

The Supreme Court has held that "prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692; *Burger v. Kemp*, 483 U.S. 776, 783, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987). Defense counsel can be

burdened by a conflict between a defendant's interests and those of another client, a witness or other third party, or defense counsel himself. *See Wood v. Georgia*, 450 U.S. 261, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). The defendant's claim that Mr. Thoenig breached his duty of loyalty is a claim that Mr. Thoenig allowed his own interests to take precedence over his "overarching duty to advocate the defendant's cause." *Strickland*, 466 U.S. at 688.

The defendant relies on *Mannhalt v. Reed*, 847 P.2d 576 (9th Cir. 1988). The defendant there was charged with several counts of robbery and possession of stolen property. The Ninth Circuit held that defense counsel had a conflict of interest because a prosecution witness accused counsel of buying stolen property from the defendant. Although counsel responded to that accusation angrily, the display of anger was

only one of many factors the court noted in explaining why there was a conflict. Much more significant were the facts that counsel neither questioned the defendant about the allegations against counsel nor withdrew so he could testify on that issue himself. That attorney allowed his anger at being accused of a crime and consequent desire to defend himself to take precedence over his duty to defend his client. This defendant's attorney, Mr. Thoenig, was not angry because of any accusation against himself. He was angry because the defendant was undermining his own defense. *Mannhalt* cannot be read to suggest that counsel's display of anger in that context created, or even evidenced, a conflict of interest.

Courts have found conflicts of interests and violations of the duty of loyalty based on counsel's nonstrategic concessions of guilt or expressions of disdain for the defendant. *See Francis v. Spraggins*, 720 P.2d 1190 (11th Cir. 1983); *State v. Holland*, 876 P.2d 357 (Utah 1994). Those cases stand for the proposition that "[a]t a minimum, an attorney's duty of

loyalty . . . requires the attorney to refrain from acting as an advocate against the client . . . ." *Holland*, 876 P.2d at 359. *See also Clozza v. Murray*, 913 P.2d 1092 (4th Cir. 1990) (not a breach of the duty of loyalty to express appropriate disgust for the offense if there is strong evidence of guilt and counsel's action is an attempt to retain credibility with the jury); *People v. Freeman*, 8 Cal. 4th 450, 882 P.2d 249, 34 Cal. Rptr. 2d 558, 31 A.L.R.5TH 888 (1994) (counsel may, in appropriate circumstances, choose to concede guilt in whole or part or not to present a defense). Thus, "[a] defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest." *Osborn v. Shillinger*, 861 P.2d 612, 629 (10th Cir. 1988); *Frazer v. United States*, 18 F.3d 778 (9th Cir. 1994).

Mr. Thoenig's act of turning away from the defendant during his allocution was not intended as advocacy in favor of a death sentence. To the contrary, counsel turned away to

prevent the jury from seeing how angry he was at the defendant for undermining counsel's attempt to persuade the jury to impose a life sentence. Although the jury was not told why counsel was angry, there is no reason to believe the jurors would have perceived counsel to be joining the State's effort to impose the death penalty. After the defendant completed his allocution, Mr. Thoenig made a closing argument urging the jury to "send him to prison for the rest of his life" and "not to kill him." Report of Proceedings at 2327. Mr. Thoenig argued that the State had failed to prove beyond a reasonable doubt that there were insufficient mitigating circumstances to merit leniency. He pointed out that if the jury voted against the death penalty, the defendant would spend the rest of his life in a six-by-eight-foot prison cell, with no chance of parole. Mr. Thoenig also discussed the concepts of "reasonable doubt" and "mitigating circumstances," noted that the defendant had no significant criminal history, and described the testimony given by the defendant's friends and relatives in the penalty phase.

With respect to the defendant's allocution, Mr. Thoenig stated that the defendant "did, in his own way, I submit, indicate remorse before you." Report of Proceedings at 2325. Mr. Thoenig concluded his argument by noting the defendant's own statement in allocution that he "'will live this nightmare the rest of my life.'" Mr. Thoenig said he did not "know how truthful [the defendant] was being to you, but I can guarantee you that if he is given life imprisonment without parole and permitted to live, he will live the nightmare the rest of his life, and he will live it in his cell, and he will die in his cell, and that the Mark of Cain is all that is required in this case." Report of Proceedings at 2327. Mr. Thoenig clearly did not ally himself with the State but argued with some emotion against imposition of the death penalty.

The defendant claims the remark about truthfulness was disparaging, however, and therefore violated counsel's duty of loyalty. Mr. Thoenig interpreted the defendant's allocution in his favor, however, as an expression of remorse. Mr. Thoenig

also "guaranteed" that the defendant would live with the nightmare the rest of his life, reinforcing the defendant's own statement. Mr. Thoenig's statement to the jury did not undermine the defendant's allocution on either of these points.

An examination of the record as a whole compels the conclusion that Mr. Thoenig did not abandon his duty of loyalty in the penalty phase so as to give rise to a presumption of prejudice. Thus, in order to prove a Sixth Amendment violation, the defendant must show that "the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance." *Strickland*, 466 U.S. at 700. "[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. We find no such probability. The only legitimate purpose for the allocution was for the defendant to express remorse and ask for mercy. The

defendant chose, against the advice of counsel, to use the allocution to give unsworn testimony in support of a self-defense claim, which the jury had already rejected in the guilt phase. Despite his angry response to that decision, Mr. Thoenig continued to actively advocate against the death penalty. It should have been clear to the jury that Mr. Thoenig felt the death sentence should not be imposed, regardless of how he felt about the defendant's allocution. Also, Mr. Thoenig's anger at the defendant was prompted largely by counsel's concern that the jurors would react negatively to the defendant's offering an implausible self-defense claim rather than expressing remorse. Though Mr. Thoenig's inability to conceal his anger is unfortunate, the concern prompting his anger was legitimate. If the jury's verdict was influenced at all by the incident, it was affected by the defendant's allocution itself rather than by Mr. Thoenig's reaction to it.

Thus, the interests of justice do not require reconsidering the defendant's challenge to his counsels' representation of him during the penalty phase.

The defendant did not challenge his attorneys' conduct during the guilt phase on appeal. He does so on several grounds now, and he also contends that he need not show actual prejudice because counsel violated their duty of loyalty and were affirmatively prevented by the State from providing adequate representation.

The defendant first challenges the manner in which his counsel reacted to his direction not to call any of the guilt phase witnesses counsel had intended to call. Mr. Thoenig informed the court that the defendant had decided not to testify and had directed counsel not to call any other witnesses on his behalf or to cross-examine prosecution witness Walter ("Pete") Hartman. During the closed hearing on this issue, Mr. Thoenig said he interpreted *State v. Jones*, 99 Wn.2d 735, 746, 664 P.2d 1216 (1983) to require him to adhere to the defendant's wishes,

regardless of his own disagreement with them. *Jones* holds that the decision whether to plead insanity rests with the defendant personally, and a competent defendant's decision to waive the insanity defense cannot be overridden. Mr. Thoenig apparently viewed the defendant's decision not to present any evidence in the guilt phase as a waiver of his claim of self-defense. Counsel was prepared to present that theory through the defendant himself and several witnesses who would have attested to victim Dethlefsen's reputation for violence. Mr. Thoenig also felt bound by the defendant's demand that Mr. Hartman not be cross-examined. The defendant, on the other hand, contends that Mr. Thoenig abdicated his responsibility to determine what evidence to present and which witnesses to call.

Regardless of counsel's interpretation of *Jones*, his accession to his client's wishes did not violate the defendant's right to effective assistance. No ineffective assistance claim can be made if the defendant preempts counsel's trial strategy. *Jeffries v. Blodgett*, 988 F.2d 923, 940 (9th Cir.1993); *Mitchell*

v. Kemp, 762 P.2d 886, 889 (11th Cir. 1985); *People v. Deere*, 53 Cal. 3d 705, 808 P.2d 1181, 1189, 280 Cal. Rptr. 424 (1991); *see Benn*, 120 Wn.2d at 666 n.6 (citing *Deere*); *Burger*, 483 U.S. 776.

Significantly, once the defendant decided not to testify, much of the evidence defense counsel had prepared to offer became irrelevant. Evidence of a victim's reputation for violence is not admissible to establish a claim of self-defense but only to support such a claim once there is some evidence that the victim's conduct justified the defendant's using deadly force. *Smith v. United States*, 1 Wash. Terr. 262, 270-71 (1869); *State v. Safford*, 24 Wn. App. 783, 791-92, 604 P.2d 980 (1979). Thus, once the defendant decided not to testify, victim Dethlefsen's violent character became irrelevant. Nevertheless, defense counsel was able to elicit such evidence by cross-examining the defendant's brother, who said Mr. Dethlefsen had a reputation for violence. Defense counsel referred to that testimony in closing argument.

The defendant had no plausible claim of self-defense. The defendant's only detailed description of the shootings presented in the guilt phase was in his alleged statement to fellow inmate Roy Patrick. According to Mr. Patrick, the defendant said he was arguing with Jack Dethlefsen when Jack made a move for a gun, which was on a table. The defendant got to the gun first. Mike Nelson, the other victim, started to run toward the gun cabinet, so the defendant shot him. Mr. Dethlefsen then reached for the telephone, and the defendant shot him too. Mr. Dethlefsen got up, stumbled and fell over a table toward the gun cabinet. Mr. Patrick could not recall if the defendant said he shot either man again.

In fact, both victims were shot in the back of the head, while lying face down on the floor, after being shot in the chest. The physical evidence proved victim Dethlefsen was either sitting on the couch or just beginning to stand when he was shot in the chest from several feet away. He was not shot during a struggle over a gun. The defendant notes that both

victims were lying facing the gun cabinet and that victim Dethlefsen apparently broke the cabinet before he fell or as he was falling. The defendant infers from the victims' location and the condition of the gun cabinet that victim Dethlefsen was attempting to get a gun. Regardless of how or where the bodies fell, the reason they fell is that the defendant shot them in the chest while they were unarmed. The defendant has no lawful excuse or justification for firing the second shots into the already mortally wounded men's heads.

For all of these reasons, counsel did not represent the defendant ineffectively by failing to present additional evidence of victim Dethlefsen's violent reputation.

The defendant also complains that defense counsel failed to present available evidence of the defendant's own nonviolent character. Counsel did, however, elicit evidence of the defendant's reputation for nonviolence in the cross-examination of Mr. Kilen. Also, in closing argument defense counsel contrasted that reputation with victim Dethlefsen's

reputation for violence. As discussed above, the defendant cannot base an ineffective assistance claim on counsels' decision to follow their client's own instructions not to call any additional character witnesses. *Jeffries*, 988 F.2d at 940; *Benn*, 120 Wn.2d at 666 n.6; *Burger*, 483 U.S. 776.

Moreover, a defendant's character is not an "essential element" of homicide within the meaning of ER 405(b), even when there is a claim of self-defense. *State v. Kelly*, 102 Wn.2d 188, 196-97, 685 P.2d 564 (1984) (specific instances of good conduct therefore not admissible under this rule). Accordingly, the evidence at issue here could have been admissible only under ER 404(a)(1) to prove "a pertinent trait of [his] character . . . ." Evidence offered under this rule "does not prove or disprove an element of a charged crime nor prove or disprove a particular defense. Its relevance is to permit, but not require, the jury to infer from the particular character trait that it is unlikely or improbable that the defendant committed the charged act." *State v. Thomas*, 110 Wn.2d 859, 865, 757 P.2d

512 (1988). Thus, any evidence of the defendant's peaceable character would not have proved that he acted in self-defense. It would have been relevant, if at all, only to suggest that he would likely not have committed the charged act. Since the defendant admittedly shot both victims in the chest and in the back of the head, he could not have been prejudiced by defense counsels' accession to his demand that no additional character witnesses be called in the guilt phase.[7]

Some of the defendant's other challenges to counsels' guilt phase performance are also related to his own actions. When counsel informed the jury during opening statement that the defendant would testify, the defendant had planned to testify. The defendant did not change his mind until well into the State's case. Defense counsels' decision to focus on lack of premeditation rather than on self-defense in closing argument flowed from the defendant's decision not to testify to support the self-defense claim.

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[7] Defense counsel did call several character witnesses in the penalty phase.

The defendant contends his attorneys were faced with an unstable client and should have anticipated his mid-trial change of heart and thus refrained from making any predictions about his testimony in the opening statement. All of the experts who examined the defendant before trial, however, found him competent, and two of the three who examined him during the guilt phase felt he was competent at least to continue with that phase. The trial judge, who observed the doctors during testimony and assessed their credibility, relied on Dr. Redick's conclusion that the defendant was malingering and manipulative. This represents a finding of fact that the defendant's attorneys were not dealing with a mentally unstable client but with one who was attempting to manipulate the situation by feigning instability. This finding, which is supported by the evidence, defeats the defendant's argument on this issue.

The defendant also contends it is ineffective per se to fail to call a promised witness, such as himself. There is

language to that effect in *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988). However, the First Circuit subsequently held that, while "failure to produce a promised witness may under some circumstances be deemed ineffective assistance, the determination of inefficacy is necessarily fact-based." *United States v. McGill*, 11 F.3d 223, 227 (1st Cir. 1993) (citing *Anderson*). The Fourth Circuit agreed with *McGill* in *Turner v. Williams*, 35 F.3d 872 (4th Cir. 1994). The court there held that "assuming counsel does not know at the time of the opening statement that he will not produce the promised evidence, an informed change of strategy in the midst of trial is 'virtually unchallengeable.'" *Turner*, 35 F.3d at 904 (quoting *Strickland*, 466 U.S. at 690). Since counsel did not know their client was going to change his mind about testifying and are not responsible for his decision, the defendant cannot challenge their mid-trial change of strategy.

The defendant next challenges defense counsels' failure to rebut the State's insurance fraud theory by presenting

evidence of the fire marshal's determination that the fire in the defendant's trailer was accidental. Defense counsel initially moved to exclude all evidence of the burglary and "arson" in the defendant's home. The prosecutor explained that the "arson evidence or the fire evidence" was that "Benn admitted to his brother that he had claimed way more than he should have in connection with his insurance claim in the fire situation. . . . [C]ertain items that he claimed were burned or destroyed, were not burned or destroyed. Some of those items . . . were found in the victim's home, Jack Dethlefsen's home." Report of Proceedings at 174. The trial court denied the defense motion in limine. The defense later renewed the motion and argued that evidence regarding the fire was inadmissible unless the State could prove, independent of the defendant's statements, that the fire had been arson. Mr. Thoenig noted that "they have no proof of arson at all." Report of Proceedings at 1199. The prosecutor responded that the defendant's brother would testify that the defendant "did commit fraud by utilizing the fire and

burglary to, at a minimum, make a claim on items being stolen . . . or being burned up when, in fact, they were not . . . ." Report of Proceedings at 1195. The court adhered to its previous ruling.

Detective Werner then related the defendant's January 1988 statement that the money he received when his trailer burned allowed him to buy a trailer park. The defendant's brother, Monte Benn, testified that he had asked his brother about three items he feared had been lost in the fire. The defendant allegedly told his brother that none of these had been in the trailer at the time of the fire. The defendant also allegedly told his brother that he had turned his furnace up to 75 degrees that day, and it was the first time he had ever used the furnace instead of the wood-burning stove. The defendant's insurance agent testified that the policy on the defendant's trailer was issued on August 7, 1987. The defendant filed a claim for items stolen in a burglary on October 12, 1987, and another claim for fire damage on December 11. The insurance

agent also testified that the defendant had paid his premium on the morning of December 11. Detective Wilson testified that he found three ivory figurines in a briefcase in victim Dethlefsen's residence after the murders. Gail Fisk identified the figurines as having been in the defendant's china cabinet when she lived with him before the fire. The defendant's insurance adjuster then testified that the defendant had received $2,500 for ivory figurines he claimed had been stolen in the burglary, and that he was paid the policy limits of $17,500 for the contents of the trailer he claimed had been damaged or destroyed in the fire, plus $15,750 for the trailer itself.

Mr. Thoenig later renewed his objection to the burglary/fire evidence and argued that "if we don't have the arson, we have a mistrial." Report of Proceedings at 1796. The court then inquired of the prosecution, "can we characterize it as an arson?" Report of Proceedings at 1801. The prosecutor replied, "I believe I called it a fire. . . . I have been pretty

careful to talk about the fire and not arson." Report of Proceedings at 1802. The court declined to declare a mistrial.

As the prosecutor's comment shows, and as discussed in more detail elsewhere, the cause of the fire was not critical to the insurance fraud theory. Defense counsels' failure to present the fire marshal's conclusion did not "deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

The defendant also contends defense counsel should have presented all available evidence regarding his competency, including evidence from Dr. Anderson, the defendant's treating psychiatrist. Counsel in a capital case is not required to conduct an exhaustive investigation or to call all possible witnesses; the standard, rather, is one of reasonableness. *Burger*, 483 U.S. at 794-95. Five doctors were appointed to examine the defendant. The court received reports from four of them before and during trial. Defense counsel had specifically requested that the fifth, Dr. Anderson, be appointed

as a treating physician, with the express proviso that "all conversation and or information of any kind provided by or discovered as a result of contacts with Mr. Benn, shall be privileged, not subject to discovery or disclosure to the state, and not be admissible for any purpose in this cause . . . ." Clerk's Papers at 338. Dr. Anderson did not misunderstand his relationship with the defendant, as the defendant now claims, nor did defense counsel act unreasonably either by obtaining a doctor solely for treatment or by failing to call additional witnesses on the competency issue.

The defendant also contends defense counsel should have objected to Gail Fisk's guilt phase testimony that she left him because he was lying to her about going to work. The defendant claims his counsel should also have objected to the prosecutor's reference to this evidence in closing argument in the penalty phase. The defendant contends that admitting evidence of his prior "bad acts" violated due process. He claims to find support for this argument in *McKinney v. Rees*,

993 F.2d 1378 (9th Cir. 1993). Rees does not hold that erroneous admission of "bad act" evidence necessarily violates due process. The Ninth Circuit reached that conclusion only as to extremely prejudicial, irrelevant evidence of a defendant's bad character, which the jury is likely to view as evidence of propensity to commit the crime charged. *Rees*, 993 F.2d at 1383-84. Ms. Fisk's testimony was neither irrelevant nor extremely prejudicial, nor the kind of evidence the jury would view as showing a propensity to kill. Nor did the prosecutor, contrary to the defendant's assertion, argue that the defendant should be executed because he had lied to Ms. Fisk. During closing argument, the prosecutor mentioned the defendant's relationship with Ms. Fisk in a list of items which demonstrated his "history of repeated fraud and deception," which the prosecutor said showed that the defendant "does not deal truthfully." Report of Proceedings at 2311-12. The impact of that argument on the jury would not have been materially altered if the reference to Ms. Fisk had been omitted. Thus,

even if defense counsel should have objected to the admission of Ms. Fisk's testimony and the prosecutor's reference to it in closing argument, the failure to do so was not prejudicial. Moreover, the defendant challenged the prosecutor's penalty phase argument on appeal. He offers no reason why the ends of justice require reconsidering that issue now.

The defendant also contends defense counsel's cross-examination of Roy Patrick was ineffective. Mr. Patrick testified regarding the alleged statements and drawings the defendant made in jail after his arrest. According to Mr. Patrick, the defendant first asked him if it was true there were people who got out of prison and wanted to go back. Mr. Patrick told the defendant he supposed there were. The defendant then said he was willing to pay someone $20,000 to say they had committed the murders with which he was charged. When Mr. Patrick asked how anyone could do that, the defendant said he could draw pictures of the house and the sequence of the murders, showing details only the murderer

would know. After describing the shootings, as set forth above, the defendant allegedly told Mr. Patrick why he killed the men. According to Mr. Patrick, the defendant "[apparently" had the two "burn his trailer to collect some insurance money which they were supposed to get half or a portion of the money." Report of Proceedings at 1233. The defendant did not pay the two but invested the money in a trailer park. Then, according to Mr. Patrick, "apparently he had them do a burglary for him," Report of Proceedings at 1233, and that one of the three men kept the ivory taken in the burglary. Mr. Patrick testified that the defendant told him that "he didn't pay them" for the burglary but "turned around [and] bought a Britz, Cadillac." Report of Proceedings at 1233. The two men "were getting perturbed, and they threatened to go to the police . . . and tell on him . . . ." Report of Proceedings at 1234.

The defendant also allegedly told Mr. Patrick that victim Dethlefsen "took him off his will and put a fellow by the name of nickname Fats, Bill Hastings, put him on the will."

Report of Proceedings at 1235. The defendant was "just furious about it. He wanted on the will." Report of Proceedings at 1235. The defendant also allegedly said he had tried to hire a man by the name of Pete who lived in the defendant's trailer park to kill Mr. Dethlefsen. According to Mr. Patrick's testimony, the defendant asked Mr. Patrick if the person who would "take the rap" for him for the two murders would also kill Pete. Report of Proceedings at 1259. The defendant wanted the person to go to Bill Hastings' workplace and tell him he was there to get paid for murdering Jack Dethlefsen and Mike Nelson. Mr. Hastings, who was supposedly violent, would then start a fight, which would bring the police. Mr. Hastings would then be blamed for hiring the killer, which would remove him from Mr. Dethiefsen's will, allowing the defendant to inherit.

The defendant specifically claims that the State's failure to provide timely discovery, which interfered with defense counsels' ability to conduct effective cross-examination, is per se prejudicial. The dissent agrees with this contention. The

defendant is correct that the prosecution failed to name Mr. Patrick as a witness until the day before trial. Additionally, defense counsel was apparently prevented from interviewing Mr. Patrick until that time, based on a false claim that Mr. Patrick was a federally-protected witness. The prosecutor also failed to provide the defense with all requested information regarding Mr. Patrick's history as an informant. Although we do not condone these discovery violations, the record does not support the dissent's conclusion that the defendant's constitutional rights were violated.

The dissent quotes from Detective Lewis' testimony at the reference hearing. That testimony does indicate that the prosecutor failed to obtain discovery from Detective Lewis. However, defense counsel had requested that particular discovery primarily in order to prove Mr. Patrick was a State agent when he was jailed with the defendant. As discussed above (and as the dissent agrees), the evidence presented at the lengthy reference hearing does not prove Mr. Patrick was a

government agent. Thus, the defendant was not prejudiced by the State's failure to provide timely discovery on this issue.

Moreover, Detective Lewis was not the only person from whom discovery was requested or provided. The record shows defense counsel interviewed Mr. Patrick on March 13, 1990, before any pretrial motions were heard. There was then a recess from March 20 through 27 while the defendant underwent a competency evaluation. There is no indication in the record that any limitations were placed on defense counsels' access to Mr. Patrick from March 13 to March 28 when Mr. Patrick testified at the CrR 3.5 hearing regarding his criminal record and his history as a police informant. Any additional interviews could have taken place during this time had defense counsel wished. During cross-examination of Mr. Patrick at the CrR 3.5 hearing, defense counsel referred to a previous conversation defense had with Mr. Patrick regarding Mr. Patrick's arrangement with the State and his activities as an informant. The record also shows discovery of Mr. Patrick's

jail records ongoing during voir dire. The prosecutor gave defense counsel the file on Mr. Patrick's arson case by the end of the CrR 3.5 hearing. Trial began with opening statements on April 4, 1990, and Mr. Patrick did not begin his testimony until April 9. As discussed in some detail below, Mr. Patrick's testimony was corroborated by other evidence and was not as significant as the defendant and the dissent maintain. Considering the record as a whole, Mr. Patrick's "last minute" identification as a witness and the State's failure to provide prompt discovery regarding his history as a police informant did not deprive the defendant of his constitutional rights.[8] *United States v. Hall*, 843 P.2d 408 (10th Cir. 1988); *State v. Charbone*, 116 Idaho 129, 774 P.2d 299 (1989), *overruled on other grounds by State v. Card*, 121 Idaho 425, 825 P.2d

[8] We note this claim was not raised in the personal restraint petition but was revealed by evidence presented at the reference hearing. Defense counsel knew Mr. Patrick was not a protected witness before trial, however, and also knew what discovery had been requested and provided. There is no newly discovered evidence to justify the defendant's raising this claim at this late date. This is an adequate and independent ground for rejecting his argument on this issue.

1081 (1991) (both rejecting ineffective assistance claims where new counsel took over three weeks before trial).

Near the end of the State's case, defense counsel said he had just learned that a witness in the case had been thrown out of the Tacoma Dome motel for dealing drugs. Counsel spoke to Deputy Prosecutor Johnson, who told him that Mr. Patrick had been staying at the Tacoma Dome motel. Prosecutor Johnson also said the room had been searched, pursuant to a warrant, but that nothing was found. Prosecutor Johnson informed the court that the officers "found absolutely nothing. There were no charges brought." Report of Proceedings at 1843. Motions for mistrial or continuance were made by defense counsel and denied. The prosecutor was directed to provide the pertinent police reports to the defense.

Following a one-day recess, defense counsel Thoenig again raised the issue regarding the search of Mr. Patrick's motel room with the court. Mr. Thoenig had by then received the police reports on that incident, which said the officers

found crack pipes, a bong, rolling papers, needles, and razor blades in the motel room. Also, the search warrant had been issued on the basis of an informant's tip that "Pat" had $600 in powder cocaine. Mr. Thoenig advised that he had not been given the name of the confidential informant, as requested. He argued that the evidence he had discovered raised the possibility that Mr. Patrick had been given preferential treatment. Pursuant to these claims, a closed hearing was held. There Tacoma Police Officer McAlpine testified that the informant said he had observed a large amount of cocaine in the motel room and had also seen Mr. Patrick cooking and packaging cocaine in the room. Officer McAlpine said there were three people in the room when the warrant was executed. None of the three was charged because "[w]e wouldn't have taken anybody for what we found there." Report of Proceedings at 1967. Melvin Stevens testified that he was the confidential informant. According to Mr. Stevens, Mr. Patrick had shown him $10,000 and had said he had been paid to

testify. Mr. Stevens testified that Mr. Patrick told him "he was here for a murder case and he was going to win, because he knew nothing about it, or somebody had probably told him that he did know something about it." Report of Proceedings at 1974. Mr. Stevens also said he saw Mr. Patrick smoking drugs a lot.

Following the closed hearing, the trial court summarized the informant's testimony in open court. The court then ruled that the informant's testimony would be collateral and declined to reveal his identity. The court said that Mr. Patrick could be recalled for additional cross-examination, however. Mr. Thoenig later said he had spoken to Mr. Patrick, who had been returned to the area for possible further testimony, and that Mr. Patrick had denied using or possessing drugs while he was in Washington. Mr. Thoenig therefore declined to recall Mr. Patrick to question him about Mr. Steven's allegations.[9]

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[9] The court ruled that the defense could not present extrinsic evidence on that issue because it was collateral.

On appeal, the defendant argued that the State's failure to disclose evidence of the search of Mr. Patrick's motel room in a timely manner was a *Brady*[10] violation, which required suppression of Mr. Patrick's testimony. The defendant also argued that the trial court improperly limited cross-examination of Mr. Patrick regarding the motel room incident. We rejected both contentions. *Benn*, 120 Wn.2d at 648-52. The defendant has not shown that the ends of justice require reconsidering those holdings. Nor can the defendant recast the same issue as an ineffective assistance claim. As we have previously observed, identical grounds for relief can be supported by different legal arguments or couched in different language. *In re Jeffries*, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). Thus, simply recasting an argument in that manner does not create a new ground for relief or constitute good cause for reconsidering the previously rejected claim. *In re Jeffries*,114 Wn.2d at 488.

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[10] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

The defendant next argues that his trial counsel should have investigated Mr. Patrick and discovered the materials his present appellate counsel have obtained regarding Mr. Patrick's stroke and apparent convulsions in jail. The defendant claims this evidence could have been used to impeach Mr. Patrick's credibility, establish a motive for him to lie for the State, and question whether his ability to recall events was impaired when the defendant allegedly confessed to him. As indicated above, Mr. Patrick was cross-examined about the reduction of his arson sentence, his work as a paid informant, and the State's payment of his motel and food bills while he was in Tacoma. Much of the "new" evidence the defendant has obtained is simply details on these matters, such as a receipt for Mr. Patrick's motel bill and a Doug Fox Travel receipt for his travel expenses.

Trial counsels' failure to discover or use this additional evidence did not "deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. The

defendant greatly overstates the need to mount a more thorough attack on Mr. Patrick's credibility. The State charged the defendant with the murders in May 1988, more than six months before he had met Mr. Patrick. Though the defendant's subsequent alleged confession to Mr. Patrick was helpful to the State, the prosecution did not need Mr. Patrick's testimony to charge Mr. Benn or to prove its case at trial. The State had the 911 tape the defendant made from victim Dethlefsen's house to report that he had just found two bodies. It also had crime lab witnesses who found high velocity blood specks, probably of victim Nelson's blood, on the defendant's boot.

Additionally, the defendant's brother, Monte Benn, testified that the defendant had told him several different stories about what had happened on the day of the murders. First, the defendant said he went home from the barbershop and then went to Jack Dethlefsen's house and found the bodies. Later, he said that instead of going home, he picked up a prostitute to take to Jack's house. In May 1989, Monte Benn

read his brother's file and learned about the blood on his boot. When Monte Benn confronted the defendant about that evidence, the defendant allegedly "admitted shooting Jack and Mike." Report of Proceedings at 1336. According to Monte Benn's testimony, the defendant claimed "he literally had to grab a gun out of Jack's hand . . . [H]e saw red." Report of Proceedings at 1336. The defendant told his brother he did not remember anything until the shooting was over, but "in the same breath he said that Mike Nelson had got up and threw a beer can at him." Report of Proceedings at 1336. Later, the defendant claimed that he entered the house after the victims had been shot and that someone stuck a gun to his head and said his children would be in danger if he said anything about it. The defendant also claimed that someone stuck a gun to his head and forced him to shoot the victims. Monte Benn also testified that on another occasion the defendant told him that just moments before the shooting, the defendant had found a piece of paper on Jack Dethlefsen's kitchen counter with Gail

Fisk's phone number on it. When the defendant showed the paper to Jack Dethlefsen, Jack responded "you got me." Report of Proceedings at 1340.

William Hastings testified that he and another man were the beneficiaries under Jack Dethlefsen's will. Although the estate was insolvent, Mr. Hastings did receive $40,000 under Mr. Dethlefsen's insurance policy.

"Pete" (Walter Peter Hartman) testified that the defendant had asked him to shoot someone named Jack. The defendant drove Mr. Hartman to Jack Dethlefsen's house to show him where it was. Mr. Hartman said he did not take any money from the defendant, nor did he shoot Jack Dethlefsen.

Considering the record as a whole, we can find no "reasonable probability that, but for counsel's" failure to more extensively cross-examine Mr. Patrick, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

The defendant also contends his attorneys should have moved to suppress the evidence seized from his jail "cell." Since the jail was overcrowded, the defendant was not held in a cell; his mattress/living area was in the common area outside Mr. Patrick's cell. The defendant claims the warrant must have been based on Mr. Patrick's tip and therefore could not have been supported by reliable information. He also claims he was denied his right to a fair hearing on this issue because the warrant application had been lost or destroyed prior to the reference hearing. The defendant is mistaken as to what was seized and from where. The defendant cites portions of the record that actually refer to a warrant authorizing a search for "items which were purported to have been prepared by Mr. Benn *and given to Mr. Patrick* in an attempt to . . . have whoever Mr. Patrick was to come up with, to confess to these crimes, be familiar with with [sic] the scene." Report of Proceedings at 512 (emphasis added). Both the trial and reference hearing transcripts make it quite clear that Mr.

Patrick was present when the officers served the warrant, and he gave the drawings of the murder scene to them. The only item they seized from the defendant's own possessions was a *SPORTS AFIELD* or *FIELD & STREAM* magazine.

No such magazine is included in the trial exhibit list. Thus, the only evidence obtained pursuant to the warrant that was admitted against the defendant was seized from Mr. Patrick's cell, with Mr. Patrick's permission.

Convicted "prisoners have no legitimate expectation of privacy and . . . the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells . . . ." *Hudson v. Palmer*, 468 U.S. 517, 530, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984). Thus, as a convicted prisoner, Mr. Patrick could not have challenged the search of his own cell. Although the defendant was still awaiting trial and was the target of the search, he had no expectation of privacy *in Mr. Patrick's cell* or in the items he gave to Mr. Patrick. Therefore, the defendant does not have standing to challenge the seizure of those items.

Rakas v. Illinois, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). Again, nothing seized from the defendant's portion of the common area was admitted against him at trial. Consequently, trial counsel did not represent the defendant ineffectively by failing to challenge the jail search. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995) (failure to challenge search does not constitute ineffective assistance unless suppression motion would have been granted and outcome would have been different).

The defendant does not have standing to challenge the search of Mr. Patrick's cell, and nothing seized from the defendant's area was admitted at trial. Thus, the loss or destruction of documents relating to the search did not violate his constitutional rights. Due process "requires disclosure only of evidence that is both favorable to the accused and 'material either to guilt or to punishment.'" *United States v. Bagley*, 473 U.S. 667, 674, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194,

10 L. Ed. 2d 215 (1963)). Documents relating to a search the defendant cannot challenge are neither favorable to him nor material to guilt or punishment.

The defendant also contends counsel represented him ineffectively by failing to object to the report the trial court submitted under RCW 10.95.120. The defendant claims counsel should have taken exception to the court's "inaccurate" statement that "It was a horrible, brutal crime. The defendant was very manipulative with everyone including his own counsel, psychologists, the court and the jury." Clerk's Papers at 919. This assessment of the case is subjective, but not "inaccurate." Shooting two men at point blank range in the head while they are lying on the floor mortally wounded can be legitimately described as both "horrible" and "brutal." The court's statement that the defendant was "manipulative" is supported by the expert testimony which the court found most credible. Although the defendant may quarrel with that assessment, a credibility determination cannot be characterized

as "inaccurate." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (trier of fact's credibility determinations "cannot be reviewed on appeal").

To summarize the incompetency of counsel claims, the defendant has not shown that the ends of justice require reconsidering his challenge to counsels' performance in the penalty phase or during the time the prosecutor was deciding whether to seek the death penalty. Even assuming his challenge to counsels' guilt phase performance is a "new" issue, he has not shown that he was prejudiced by unprofessional errors or omissions on counsels' part.

Roy Patrick's Testimony. The defendant contends the trial court erred in admitting Mr. Patrick's testimony and in limiting his cross-examination. The defendant argued at trial that Mr. Patrick's long history as a paid informant meant that he was a state agent when the two were housed together at the Pierce County jail. The trial court found to the contrary, based on the testimony of the detectives to whom Mr. Patrick

reported the defendant's conversations. The defendant did not assign error to that finding on appeal. *Benn*, 120 Wn.2d at 648--50. As noted above, we found no *Brady* violation with regard to the search of Mr. Patrick's motel room and upheld the trial court limitation on defense counsels' cross-examination of Mr. Patrick regarding the motel room incident. *Benn*, 120 Wn.2d at 648-52. The defendant offers no persuasive reason for us to reconsider either of those holdings.

With respect to Mr. Patrick's "interrogation"[11] of the defendant, Mr. Benn claims to have newly discovered evidence supporting his contention that Mr. Patrick was acting as a state agent when the two were jailed together. Once a defendant's Sixth Amendment right attaches with the formal filing of charges, an undisclosed government agent may not deliberately elicit incriminating statements from the defendant. *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364

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[11] Since the defendant did not know Mr. Patrick was an informant, their conversations were not "interrogation" and no advisement of rights was required. Illinois v. Perkins, 496 U.S. 292, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990).

(1986); *Maine v. Moulton*, 474 U.S. 159, 176, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985); *United States v. Henry*, 447 U.S. 264, 270-72, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980); *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964). As he did at trial, the defendant bases his claim that Mr. Patrick was a "government agent" on Mr. Patrick's long history as a police informant and his return to that occupation after his release from jail. This argument is premised on a misunderstanding of who qualifies as a government agent in this context.

The fact that an inmate has an existing relationship with law enforcement, has previously been an informant, or has received some benefit for reporting a defendant's statements may be evidence of his status as a government agent. *United States v. Johnson*, 4 F.3d 904, 910 (10th Cir. 1993); *United States v. Brink*, 39 F.3d 419, 423 (3d Cir. 1994). None of these factors is dispositive, however. *Johnson*, 4 F.3d at 910; *Brink*, 39 F.3d at 423; *United States v. York*, 933 F.2d 1343, 1356 (7th

Cir. 1991); *United States v. Watson*, 894 F.2d 1345, 1348 (D.C. Cir. 1990); *United States v. Van Scoy*, 654 F.2d 257, 260 (3d Cir. 1981). Similarly, the informant's understanding, either from past conduct as an informant or from the prison environment, that cooperation with the authorities may prove beneficial does not necessarily make the informant an agent. *York*, 933 F.2d at 1357; *Lightbourne v. Dugger*, 829 F.2d 1012, 1021 (11th Cir. 1987). For there to be an agency relationship, there must be at least an implicit agreement between the parties with respect to the current undertaking. *Johnson*, 4 F.3d at 910; *United States v. Calder*, 641 F.2d 76, 78-79 (2d Cir. 1981). Furthermore, the principal must have the ability to control that undertaking. Brink, 39 F.3d at 424; York, 933 F.2d at 1357.

Following this analysis, federal circuit courts have declined to find agency relationships with long-standing police informants who expected a benefit from their information because "there was no evidence that the government had directed or steered the informant toward the defendant." *York*,

933 F.2d at 1356 (citing *Watson*, 894 F.2d 1345). Courts have also declined to find agency, even when the informant and the defendant were placed in the same cell, because there was no prior agreement between the government and the informant. *Johnson*, 4 F.3d at 911-12; *United States v. Taylor*, 800 F.2d 1012 (10th Cir. 1986); *Calder*, 641 F.2d at 78-79.

There is also no such evidence here. Officer Minker stated only that "on occasions in the past, known snitches" were intentionally placed with particular inmates to elicit information from them. App. to Pet. Ex. 45 at 1. When asked to identify cases in which this had happened, however, Officer Minker could name none. He also said he had no knowledge that this had occurred in the defendant's case.

The defendant has also presented defense attorney Charlotte Cassady's statement that during her conversation with Mr. Patrick, he told her that "informants were placed in cells with inmates by the police 'all the time.'" App. to Pet. Ex. 7 at 1. Ms. Cassady did not say that Mr. Patrick told her he was

placed in a cell with the defendant, however. At the reference hearing, Mr. Patrick and all of the detectives and jailers involved in the case testified that the defendant was not placed with Mr. Patrick, nor was there any agreement between Mr. Patrick and the government regarding his attempt to elicit information from the defendant. The evidence thus supports the superior court's finding that Mr. Patrick was not used as an agent in this case.

The defendant's remaining contentions regarding Mr. Patrick deal with trial counsels' ability to impeach his credibility. The defendant presented evidence at the reference hearing that Mr. Patrick was involved in criminal activity in the months leading up to the defendant's trial, and also after trial. The confidential informant, Melvin Stevens, made the same kinds of allegations at the in camera hearing during the defendant's trial. The trial court excluded this evidence. On appeal, we held that the "allegations of Patrick's drug dealing were not relevant to his credibility" because the activities the

informant described occurred after Mr. Patrick made his bargain to testify against the defendant and "did not impact Patrick's ability to relate his discussions with Benn on the witness stand." *Benn*, 120 Wn.2d at 651. The defendant has not shown that the ends of justice would be served by reconsidering that holding.

The defendant claims the evidence presented at the reference hearing raises a question as to Mr. Patrick's mental state at relevant times. Although Melvin Stevens did testify at the reference hearing that Mr. Patrick used drugs while he was at the Tacoma Dome motel, Mr. Stevens made the same allegation at the in camera hearing during trial. This is not new evidence. Moreover, the motel room was searched based on Mr. Stevens' allegations well before Mr. Patrick testified, and the alleged drug use occurred even before that. There is no evidence that Mr. Patrick was under the influence of drugs either while he testified at trial or while he was jailed with the defendant.

The defendant also challenges the trial court's failure to reveal to his defense counsel Mr. Stevens' in camera testimony that Mr. Patrick said he knew nothing about the murder and was relating what someone told him. That is not what Mr. Stevens said. He testified that Mr. Patrick told him "he was here for a murder case and he was going to win, because he knew nothing about it, or somebody had probably told him that he did know something about it." Report of Proceedings at 1974. It is unclear what Mr. Stevens meant by this statement. It makes no sense to say that Mr. Patrick was "going to win" a murder case "because he knew nothing about it." Nor is Mr. Stevens' reference to someone telling Mr. Patrick "that he did know something about it" the same thing as this unnamed third person telling Mr. Patrick the details about the murder he related at trial. At the reference hearing, Mr. Stevens claimed that Mr. Patrick said he was going to testify that the defendant did something he did not do. The trial court found that Mr. Stevens was not credible, and that Mr. Patrick actually said

only that he was going to testify for the State and he would be paid.

Even if the defendant should have been allowed to impeach Mr. Patrick with Mr. Stevens' statements, improper denial of a defendant's opportunity to impeach a witness is not necessarily reversible error. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).[12] Whether limitations imposed on cross-examination are prejudicial depends upon several factors, including "the importance of the witness' testimony in the prosecution's case . . . the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall

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[12] *Van Arsdall* was a direct appeal from a criminal conviction. On direct appeal, the State must show that constitutional error is harmless, whereas in a personal restraint petition the defendant must show he was prejudiced by a constitutional error. *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988). Nevertheless, the Supreme Court's analysis of the harmless error question in *Van Arsdall* is helpful in determining whether the defendant was prejudiced.

strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684.

Mr. Stevens' in camera testimony was of marginal impeachment value at best. It is unclear even from Mr. Stevens' testimony at the reference hearing what Mr. Patrick said the defendant "had not done" (assuming any such statement was made at all). Although the precise value of such an ambiguous statement is difficult to determine, the statement is not as damaging to the State's case as the defendant contends.

There is abundant evidence that the defendant shot the Victims--he conceded that issue in opening statement. One of the statements Mr. Patrick attributed to the defendant was that victim Dethlefsen was reaching for a gun. Defense counsel based the defendant's self-defense claim largely on that hearsay statement. Telling the jury that the defendant "had not done" this (i.e., had not acted in self-defense) would have undermined the defense. Mr. Patrick's testimony that the defendant hired the victims to burn his house could have been impeached but,

as discussed, there was substantial evidence of insurance fraud even if the fire were accidental. Impeaching Mr. Patrick's claim that the defendant confessed to him would have been of little value in light of Monte Benn's testimony that the defendant also confessed to him.

The defendant claims Mr. Patrick's credibility is undermined by his statement to the police that the defendant admitted participating with the victims in making "snuff films" which showed themselves killing or injuring prostitutes. Mr. Patrick was unable to produce a videotape, and the officers decided that this contention was worthless.

The defendant's "new evidence" regarding Mr. Patrick does not provide grounds for relief.

Disclosure of Melvin Stevens' Identity. The defendant contends the trial court erred in failing to disclose Mr. Stevens' identity as the confidential informant. This argument is largely a restatement of the defendant's challenge to the trial court's holding that Mr. Stevens' testimony was collateral and not,

therefore, a proper means of impeaching Mr. Patrick. We found no abuse of discretion in this ruling. *Benn*, 120 Wn.2d at 651-52. The defendant has not shown that the ends of justice would be served by reconsidering that holding.

Exculpatory Evidence. The defendant contends the prosecutor withheld exculpatory evidence concerning the fire marshal's conclusions regarding an investigation of a fire in the defendant's home. Due process "requires disclosure only of evidence that is both favorable to the accused and 'material either to guilt or to punishment.'" *Bagley*, 473 U.S. at 674 (quoting *Brady*, 373 U.S. at 87). Evidence is "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. In applying this "reasonable probability" standard, the "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a

verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678).

The State did not provide the defense with a copy of Detective Reinicke's report describing the examination of the trailer after the fire or of the fire marshal's own report. The defense was given a copy of Detective Rouseff's report more than a year before trial, however. Detective Rouseff's report says the fire marshal's office concluded that "this was most likely an accidental fire," but that Crime Stoppers had received an anonymous tip claiming that the fire was set to look like an accident. Shortly before Christmas 1988, the defendant moved for discovery of the identity of the Crime Stoppers informant referred to in this report. The prosecutor revealed that person's

name on December 19, 1988--again, more than a year before trial.

"A *Brady* violation does not arise if the defendant, using reasonable diligence, could have obtained the information" at issue. *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994). The defendant in *Williams* argued that the government violated *Brady* by failing to provide the full text of a witness's statement. The Circuit Court found no violation because the defense had been given a summary of that statement and counsel could have obtained the full text through due diligence. *Williams*, 35 F.3d at 163. There are many cases from other circuits to the same effect. *See United States v. Hamilton*, 107 F.3d 499 (7th Cir.), *cert. denied*, 521 U.S. 1127 (1997); *Hoke v. Netherland*, 92 F.3d 1350 (4th Cir. 1996); *Mills v. Singletary*, 63 F.3d 999 (11th Cir. 1995); *United States v. Willis*, 997 F.2d 407 (8th Cir. 1993); *United States v. Perdomo*, 929 F.2d 967 (3d Cir. 1991); *see also California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413

(1984) (destruction of evidence violates due process only if its exculpatory value was apparent and the defendant is unable to obtain comparable evidence by reasonably available means). Under the reasoning in these cases, the defendant cannot show a *Brady* violation because the defense was given a summary of the fire marshal's conclusion that the fire was accidental. Defense counsel was aware of that conclusion and commented during trial that the State had no physical evidence of arson. The defendant also mentioned in his allocution that the sheriff's department and the insurance company had both investigated the fire and concluded "[t]here was no arson." Report of Proceedings at 2287. The investigators and their reports were available through the exercise of due diligence.

The defendant would characterize defense counsels' failure to pursue the issue as additional evidence of ineffective assistance. The cause of the fire, however, was not critical to the State's case. The insurance fraud scheme was only a possible motive for the murders. The defendant also was

reportedly angry because victim Dethlefsen removed the defendant from his will. Additionally, according to the defendant's brother, Monte, the defendant said he shot Jack Dethlefsen after seeing the defendant's former girl friend's name on a note in Mr. Dethlefsen's kitchen. Whether the defendant's trailer burned accidentally or intentionally was irrelevant to either of these motives. Even as to the insurance fraud scheme, the actual cause of the fire was not critical. The prosecutor explained several times that this theory did not require the fire to be arson but simply that the claim be fraudulent. As discussed above, several witnesses, including the defendant's brother, testified that many items of either sentimental or significant financial value were removed from the trailer before the fire. Some of the items the defendant told his insurer were damaged in the fire were later found, undamaged. Proving the fire was accidental would not rebut this evidence of a fraudulent insurance claim for items not destroyed.

The defendant contends that proving the fire was accidental would have impeached Mr. Patrick's testimony when he said the defendant had the victims burn his trailer. That is not exactly what Mr. Patrick said, however. He testified that the defendant "[a]pparently" had the two men "burn his trailer to collect some insurance money which they were supposed to get half or a portion of the money." Report of Proceedings at 1233. Mr. Patrick's testimony is not entirely clear, but his use of the word "apparently" suggests he was drawing inferences from whatever the defendant actually told him. Expert testimony would have been useful to rebut Mr. Patrick's conclusion that the fire was deliberately set, but it would have had no bearing on Mr. Patrick's reference to the defendant's collection of insurance or the division of proceeds. The defendant did in fact collect insurance proceeds from the fire, and some of the property for which he was paid was later found in Jack Dethlefsen's home.

While all of the evidence regarding the fire investigation may not have been disclosed before trial, the defense was provided with the fire marshal's conclusion and could have obtained the actual report. The defendant has shown neither a Brady violation nor a constitutionally deficient performance by his trial counsel.

Closing Argument. The defendant claims the prosecutor made improper remarks in closing argument in both the guilt phase and the penalty phase. The defendant challenged the penalty phase closing argument on direct appeal. We held that "the remarks Benn challenges either were not improper or were stricken." *Benn*, 120 Wn.2d at 676. The defendant offers no reason why this holding should be reconsidered or why he should be permitted to expand his challenge to the penalty phase argument to include remarks he did not challenge on appeal.

With respect to the guilt phase, the defendant claims the prosecutor commented on his failure to testify and called him a

liar. The defendant misreads the transcript. Defense counsel conceded, in his closing argument, that "Benn lied about his involvement initially. He lied when he made that 911 call . . . he lied when he made his statements to Reinicke and Wilson, and he continued on with this deception for as long as he could." Report of Proceedings at 2087. Defense counsel urged the jury to consider "whether you might not have lied under the same circumstances." Report of Proceedings at 2087. In rebuttal, the prosecutor noted defense counsel's concession that the defendant shot the two victims. She continued, "But in fact the only evidence that the defendant shot [the victims] was presented by the state. The defendant has never conceded that. He lied--." Report of Proceedings at 2098. Defense counsel interrupted with an objection. The prosecutor then finished the sentence "--in his statement to the police officers on February 10, 1988." Report of Proceedings at 2098.

The prosecutor's first remark was an accurate observation that, while the defense conceded the defendant had

killed the victims, all of the evidence that he committed the murders had been presented by the State. The prosecutor was not urging the jury to draw any adverse inference from the defendant's failure to testify. The "liar" comment simply echoed defense counsel's own admission that the defendant had lied to the police after the murders and had maintained that lie as long as he could. Although use of the term "liar" is generally improper, the remarks here did not prejudice the defendant.

Speedy Trial. The defendant claims a violation of his constitutional right to a speedy trial. Four factors must be considered in evaluating this claim: the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); *United States v. Loud Hawk*, 474 U.S. 302, 313-14, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986). The defendant was charged in May 1988 and brought to trial in March 1990. Virtually the entire delay is attributable to continuances requested or agreed to by the

defense. The defendant personally objected only to the last continuance, which his counsel requested in order to more fully prepare for trial. There is no evidence the defendant was prejudiced by the delay in bringing him to trial.

Presence. The defendant contends the trial court violated his constitutional rights by granting a continuance in his absence. The defendant assumes he had a right to be present during that hearing. A criminal defendant has the "right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (per curiam) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674, 90 A.L.R. 575 (1934)). A defendant does not have a right to be present during in-chambers or bench conferences between court and counsel on legal matters. *In re Personal Restraint of Lord*,123 Wn.2d at 306; *United States v. Williams*, 455 F.2d 361 (9th Cir. 1972).

Nor did the defendant have the right to be present during a hearing on a motion for a continuance. His absence during that hearing did not affect his opportunity to defend the charge. The motion for continuance involved no presentation of evidence, nor was the purpose of the hearing on the motion to determine the admissibility of evidence or the availability of a defense or theory of the case. Moreover, the trial court was aware of the defendant's opposition to any continuance. The trial was delayed at defense counsels' request to enable counsel to provide the defendant with a competent defense.

To support his position, the defendant also relies on a Ninth Circuit decision which holds that violation of the right to be present is a "structural error" which can never be held harmless. *Rice v. Wood*, 44 F.3d 1396, 1401-02 (9th Cir. 1995) (absence at return of verdict in penalty phase), *vacated in part*, 77 F.3d 1138 (9th Cir. 1996). Even if the defendant were correct about the scope of the right to be present, his reliance on the panel decision in *Rice* is misplaced. The Ninth Circuit

reheard that case en banc and held that the denial of a defendant's right to be present during criminal proceedings can be a "trial error" (as opposed to a "structural" error) and can therefore be subject to harmless error analysis. *Rice v. Wood*, 77 F.3d at 1141. *Accord Hegler v. Borg*, 50 F.3d 1472, 1476 (9th Cir. 1995) (absence when trial testimony was read to the deliberating jury was subject to harmless error analysis; citing *Rushen v. Spain*, 464 U.S. 114, 117-18, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983)); *In re Personal Restraint of Lord*, 123 Wn.2d at 306-07 (following *Rushen* and holding that defendant's absence during numerous pretrial hearings and sidebar conferences was harmless, if error). The same factors which support the conclusion that the defendant had no right to be present at the hearing also compel us to conclude that, if any such right existed, his absence was harmless.

Reasonable Doubt. The defendant contends the penalty phase "reasonable doubt" instruction was erroneous because it referred to "the charge" rather than to the State's allegation that

there were insufficient mitigating circumstances to merit leniency. He contends the jurors could have interpreted this instruction to require them to answer "yes" (resulting in a death sentence) if they had an abiding belief that he committed the crimes charged, regardless of the evidence presented in mitigation.

The "proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction" in an unconstitutional or improper manner. *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990); *In re Personal Restraint of Lord*, 123 Wn.2d at 323. In making this determination, "'a single instruction to a jury may not be judged in artificial isolation,'" but must be viewed in the context of the entire set of jury instructions. *Boyde*, 494 U.S. at 378 (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973)); *In re Personal Restraint of Lord*, 123 Wn.2d at 323.

The penalty phase instructions informed the jury that the defendant entered the sentencing proceeding meriting leniency, and the State bore the burden of proving beyond a reasonable doubt that there were not sufficient circumstances meriting leniency. One instruction included the standard definition of "reasonable doubt" as a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. It concluded, "If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." Clerk's Papers at 829. The court also told the jury that the defendant's sentence would be death if the jury unanimously found that the State had met its burden of proving insufficient mitigating circumstances to merit leniency, or life without parole if the jury either unanimously found to the contrary or was unable to reach a unanimous verdict. There is no reasonable likelihood that a juror receiving all of these instructions would have understood "the charge" to refer to the

murder charge itself. In context, the phrase clearly referred to the State's "charge" that there were insufficient mitigating circumstances to merit leniency.

Prior Conviction. The defendant contends his theft conviction is constitutionally invalid and therefore should not have been admitted in the penalty phase. That plea was entered in 1987. With exceptions not applicable here, any challenge to that conviction should have been brought by July 23, 1990. RCW 10.73.090, .100, .130; *see In re Personal Restraint of Runyan*, 121 Wn.2d 432, 450-51, 853 P.2d 424 (1993) (sentencing use of pre-1989 conviction does not retrigger statute of limitation period). Since the defendant did not challenge the plea until 1994, this claim is barred by RCW 10.73.090.

Moreover, the factual basis requirement is imposed by CrR 4.2(d) as a procedural method of ensuring that a defendant enters a plea with knowledge of the law in relation to the facts. *In re Personal Restraint of Keene*, 95 Wn.2d 203, 206, 622

P.2d 360 (1980). Since this is a personal restraint petition, the defendant must show the plea is constitutionally infirm, not simply that the court rule was violated. *In re Personal Restraint of Keene*, 95 Wn.2d at 205; *In re Personal Restraint of Harris*, 111 Wn.2d 691, 697, 763 P.2d 823 (1988). He has not met that burden.[13] The plea form he signed lists all of the elements of first degree theft by employment security fraud, including intent to deprive and the value of the property taken (more than $1,500), as well as the rights he would waive by pleading guilty, the maximum penalty for the offense, and the standard range term. The defendant claims the plea is invalid because the description of his conduct on the plea form does not mention the intent element. That description reads, "while I was drawing unemployment benefits I failed to report earnings of $2,200.00 from jobs, which would have effected [sic] my eligibility for public funds." App. to Pet. Ex. 47 at 5. The

[13] The untimeliness of this claim is an adequate and independent basis for our rejection of it. Our further observation that the claim is also meritless is not to be taken to suggest we would, or could, grant relief based on a time-barred claim.

defendant now claims this is an inadequate factual basis for the plea, without which the plea is constitutionally infirm. The defendant does not claim to have been ignorant of the elements of the crime, nor would such a claim be credible in light of the contents of the plea form he signed. Nor does he claim he acted without intent to deprive the State of its funds by failing to report the $2,200 he earned while receiving unemployment benefits. "Under these circumstances, his understanding of the nature of the charge may be assumed from his representation by presumptively competent counsel." *Harris*, 111 Wn.2d at 698 (citing *Marshall v. Lonberger*, 459 U.S. 422, 437, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983) (absent evidence to the contrary, counseled defendant may be presumed to have been informed of the nature of the charges)).

Competency To Be Executed. The defendant claims there is a question as to his present competency to be executed. Execution of an "insane" prisoner is cruel and unusual punishment, in violation of the Eighth Amendment. *Ford v.*

Wainwright, 477 U.S. 399, 410, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986); *State v. Rice*, 110 Wn.2d 577, 620, 757 P.2d 889 (1988). As far as the Eighth Amendment is concerned, condemned prisoners are "insane" in this context only if they are "'unaware of the punishment they are about to suffer and why they are to suffer it.'" *Penry v. Lynaugh*, 492 U.S. 302, 333, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (quoting *Wainwright*, 477 U.S. at 422 (Powell, J., concurring in part)). The definition is somewhat more stringent under state law. *State v. Harris*, 114 Wn.2d 419, 430, 789 P.2d 60 (1990) (defendant must be able to communicate rationally with counsel).

The only evidence the defendant offers on this issue is paragraph 17 of Dr. Gripe's declaration, which is appended to the petition. In that paragraph, Dr. Cripe states he recently reviewed the defendant's medical and mental health records from the prison and a declaration from the defendant's brother, Monte Benn. The mental health records show the defendant has

been an ongoing management problem; he has been diagnosed with major depression and delusional disorder, and he has received psychotropic medications. Dr. Cripe states these materials support his original conclusion that the defendant has a significant mental disorder.

Nothing in Dr. Gripe's statement suggests that the defendant lacks the mental capacity necessary for execution of his death sentence to be constitutional. The defendant concedes this point in his reply to the State's response and says he is raising this issue now only to ensure it is not deemed waived. This concern is misplaced. No constitutional violation can be shown unless the prisoner is currently insane; while he is sane, the issue is premature. Should the defendant's condition at some point deteriorate, he or his representatives can bring an appropriate action to prevent him from being executed while insane. This is simply not the kind of issue which can be

waived by failure to raise it in the first petition for post-conviction relief.[14]

Death Penalty Statute. The defendant raises various constitutional challenges to the death penalty statute, RCW 10.95. We have repeatedly upheld the death penalty statute against a variety of constitutional challenges. *See In re Personal Restraint of Lord*,123 Wn.2d at 296; *In re Personal Restraint of Rice*,118 Wn.2d 876; *State v. Rupe*, 108 Wn.2d 734, 743 P.2d 210 (1987); *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407 (1986); *State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722 (1986); *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984); *State v. Rupe*, 101 Wn.2d 664, 683 P.2d 571 (1984). As the defendant notes, however, a federal district court judge has held that our application of the statutorily required proportionality review procedure[15] violates due process. *Harris ex rel. Ramseyer v. Blodgett*, 853 F. Supp. 1239 (WD. Wash.

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[14] The claim would also be exempt from the statute of limitation under RCW 10.73.100(1).

[15] *See* RCW 10.95.130(2)(b).

1994) (granting relief solely on the basis of ineffective assistance of counsel), *aff'd on other grounds*, 64 F.3d 1432 (9th Cir. 1995). We have previously acknowledged *Harris* "[w]ithout determining the merits of these challenges under this court's current proportionality review" and rejected a due process challenge to the review procedure. *State v. Brett*, 126 Wn.2d 136, 208, 892 P.2d 29 (1995); *see also State v. Pirtle*, 127 Wn.2d 628, 683, 904 P.2d 245 (1995). More recently, we summarily rejected a due process challenge to that procedure. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997).

We now take this occasion to respond to *Harris* and reaffirm our holding that our proportionality review procedure under RCW 10.95.130(2)(b) does not violate due process. The District Court would apparently require us to conduct a preliminary review of the cases that might be thought similar, provide counsel with notice of those cases, allow briefing on the subject, and then conduct another proportionality review based on that briefing. *Harris* does not persuasively explain

why a defendant must be provided such prebriefing notice. As the Eighth Circuit recently noted, counsel regularly brief all kinds of issues without prior notice of how the court will resolve underlying legal or factual questions:

> The question of proportionality involves a comparison with other cases, and the issue, to be sure, is not soluble in precisely quantifiable terms. It involves the exercise of discretion and judgment. That is true of many crucial issues in the law-- deciding what a reasonably prudent person would do in certain circumstances, for example. We see no unfairness or deprivation of due process in the Missouri Supreme Court's procedures for exercising a proportionality review.

Murray v. Delo, 34 F.3d 1367, 1377 (8th Cir. 1994).

The District Court's decision in *Harris* is unique in its invalidation of a state court's method of conducting comparative proportionality review. Although the Ninth Circuit affirmed the grant of relief in *Harris* itself, it did so based solely on its finding of ineffective assistance of trial counsel. The Circuit Court did not express agreement with the District Court's concerns regarding proportionality review. In a case

involving another Washington defendant, the Ninth Circuit described *Harris* as "a fact-specific ruling." *Rupe v. Wood*, 93 F.3d 1434, 1443 (9th Cir. 1996), *cert. denied*, 519 U.S. 1142 (1997). After reviewing the facts before it, the court said, "we decline to find that the review was so inadequate that Rupe was essentially deprived of any review, and due process will not recognize a less egregious injury." *Rupe*, 93 F.3d at 1443 (citing *Campbell v. Blodgett*, 997 F.2d 512, 522 (9th Cir. 1992)).

The Fourth Circuit has rejected, as involving only state law, a claim that the Virginia Supreme Court's proportionality review was constitutionally flawed. *Peterson v. Murray*, 904 F.2d 882, 887 (4th Cir. 1990). That review was conducted pursuant to a statute worded identically to RCW10.95.130. *See* VA. CODE ANN. § 17-110.1(0(2) (court must determine if the death sentence is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant). Several other courts have also rejected challenges

to state court proportionality review. *Booker v. Wainwright*, 764 F.2d 1371, 1380 (11th Cir. 1985) (Florida Supreme Court did not deny a capital defendant due process "by not providing him a written account of its proportionality review of his sentence"); *Collins v. Lockhart*, 754 F.2d 258, 261 (8th Cir. 1985) (rejecting claim that the state court's proportionality review was "legally insufficient"); *Prejean v. Maggio*, 765 F.2d 482 (5th Cir. 1985) (en banc) (rejecting challenge to the manner in which the Louisiana Supreme Court conducted proportionality review in that case).

These Circuit Court cases flow from the Supreme Court's holding that the Constitution does not require states to conduct comparative proportionality review at all. *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). The prisoner in *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), argued that the manner in which the Arizona Supreme Court conducted its statutorily required proportionality review failed to distinguish his case

from others in which the death sentence had not been imposed. The Supreme Court declined to scrutinize that procedure:

> [W]e have just concluded that the challenged [aggravating] factor has been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer. This being so, proportionality review is not constitutionally required, and we lawfully may presume that [Walton's] death sentence was not wantonly and freakishly imposed--and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment. Furthermore, the Arizona Supreme Court plainly undertook its proportionality review in good faith and found that Walton's sentence was proportional to the sentences imposed in cases similar to his. The Constitution does not require us to look behind that conclusion.

Walton, 497 U.S. at 655-56 (citations and internal quotation marks omitted). The Court thus appears to have held that the manner in which a state court conducts its comparative proportionality review does not present a federal constitutional issue, as long as the state court acts in good faith. *LaRette v. Delo*, 44 F.3d 681, 688 (8th Cir. 1995) (treating *Walton* as foreclosing challenge to Missouri Supreme Court's proportionality review); *Banks v. Horn*, 939 F. Supp. 1165

(M.D. Pa. 1996) (disagreeing with *Harris*, 853 F. Supp. 1239, and rejecting challenge to Pennsylvania Supreme Court's proportionality review). Comparative proportionality review is an inherently difficult task and we have acknowledged our struggle with it. *See Brett*,126 Wn.2d at 208; *Benn*, 120 Wn.2d at 695-96 (Durham, J., concurring). That struggle has always been undertaken in good faith, however, and in a sincere attempt to comply with RCW 10.95.130(2)(b).[16]

The existence of an analytically flawed federal district court decision is not a compelling reason to vacate this defendant's death sentence or reconsider the proportionality review in his case.

Mitigating Factors--Instructions. The defendant challenges the penalty phase instruction regarding mitigating circumstances. He argued on direct appeal that the instructions precluded consideration of mitigating factors. We disagreed. *Benn*, 120 Wn.2d 669-70. There is no reason to reconsider this

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[16] The 1997 Legislature passed Senate Bill 5093, which would have repealed this statute. The Governor vetoed that bill on April 24, 1997.

issue. We recently adhered to our holding that the jury may be instructed on all of the items listed in RCW 10.95.070, as nonexclusive examples of relevant factors, whether or not evidence is presented on one or more of them. *State v. Gentry*, 125 Wn.2d 570, 649-50, 888 P.2d 1105 (1995).

Unanimity. The defendant contends the penalty phase instructions improperly encourage a unanimous verdict. That challenge is based on *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992). The claimed error both here and in *Mak* stems from the question which RCW 10.95.060(4) requires the penalty phase jury to be asked: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" The statute goes on to say that "[i]n order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously." If the jury unanimously answers "yes" to this question, the defendant will be sentenced to death. RCW 10.95.080(1). If

"the jury does not return an affirmative answer," the sentence will be life imprisonment without the possibility of parole. RCW 10.95080(2).

Consistent with these provisions, the juries here and in Mak were told that the sentence would be death if the jurors unanimously answered the statutory question "yes," or to life without parole if the jury unanimously answered "no" or failed to reach a unanimous decision. The jury in Mr. Benn's case was given the following special verdict form:

> Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?
>
> ANSWER
> [] "YES"
> [] "NO"
> [] THE JURY IS UNABLE TO UNANIMOUSLY AGREE

Clerk's Papers at 822; see also *Mak*, 105 Wn.2d at 753-54 (substantially identical language).

Citing the Supreme Court's decision in *Mills v. Maryland*, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), the Ninth Circuit in *Mak* held that it was error to instruct the jurors that all 12 had to agree in order to answer the statutory question "no." *Mak*, 970 P.2d at 624-25. The court said it "need not decide, however, whether in this case the prejudice would be sufficient in itself to require resentencing" because reversal was required on other grounds. *Mak*, 970 P.2d at 625. Thus, *Mak* does not support the defendant's contention that the claimed error is itself grounds for vacating his death sentence.

More importantly, the Ninth Circuit's reliance on *Mills* in *Mak* was misplaced. The instructions in *Mills* were very different from those given in *Mak* and the present case. The jury in Mills was required to answer "yes" or "no" with respect to each listed aggravating and mitigating factor and then asked if the aggravating factors marked "yes" outweighed the mitigating factors marked "yes." *Mills*, 486 U.S. at 384. The Supreme Court found these questions improper because they

could reasonably be interpreted as precluding individual jurors from considering evidence of a particular mitigating factor unless all 12 jurors unanimously agreed that factor had been proven. *Mills*, 486 U.S. at 375-80.

The instructions in *Mak* and the present case did not require the jurors to answer "yes" or "no" with respect to individual mitigating circumstances. Nor were the jurors limited in the statutory balancing process to a consideration of only those circumstances on which all 12 had agreed. The jurors were simply asked if there were sufficient mitigating circumstances to merit leniency. This question allowed each individual juror to consider any factor he or she felt was mitigating, whether or not any of the other jurors agreed it had been proven or was mitigating. *See Campbell v. Kincheloe*, 829 P.2d 1453, 1466 (9th Cir. 1987) (noting that Washington's statute "imposes no limits on the mitigating evidence a capital defendant may introduce").

Also, as required by RCW 10.95.060, the jurors here and in *Mak* were told the death penalty would be imposed only if they unanimously found insufficient mitigating circumstances to merit leniency. The juries here and in *Mak* did in fact reach unanimous verdicts. The "error" the Ninth Circuit identified in *Mak* is that the jury could not answer "no" to the statutory question unless that decision was also unanimous. *Mak*, 970 P.2d at 625. If "yes" and "no" were the only options the jury had been given, the instructions would be similar to those held improper in *Kubat v. Thieret*, 867 F.2d 351 (7th Cir. 1989), which the Ninth Circuit cited in *Mak*. The juries here and in *Mak*, however, were also told the penalty would be life without parole if it either unanimously answered "no" or was unable to reach a unanimous verdict. The option of a nonunanimous verdict was included in the verdict form. In *Kubat*, by contrast, the jury was given only two possible verdicts, either of which had to be unanimous.[17]

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[17] The Ninth Circuit did acknowledge that "the jury instructions and verdict form in *Mak* were not as prejudicial as those in *Kubat*." *Mak*,

The holding in *Mak* also appears to conflict with *Boyde*, 494 U.S. 370. The Supreme Court there noted inconsistencies in its prior decisions and concluded that "the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction" in an improper manner. *Boyde*, 494 U.S. at 380. The Court also emphasized that, even in capital cases, "'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" *Boyde*, 494 U.S. at 378 (quoting *Cupp*, 414 U.S. at 146-47).

The "overall charge" here included the court's instructions describing three possible results the jury could reach and their corresponding sentencing consequences:

> If you unanimously answer "yes," the sentence will be death. If you unanimously answer "no," or if you are unable to agree on a unanimous answer, the sentence will be life imprisonment without possibility of parole.

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970 F.2d at 625.

Clerk's Papers at 826. Admittedly, there is no need to ask if the jurors reached a unanimous verdict of "no" if one "no" vote results in the same sentence as 12.[18] Still, nothing in the court's instructions said or implied that the defendant could avoid the death penalty only if the jury unanimously answered "no." The likelihood the jury was misled--either as to the consequences of a nonunanimous decision or as to its ability to report a nonunanimous decision--is extremely remote.

We disagree with the reasoning in *Mak*. There is no reasonable likelihood this defendant's jury would have been confused either as to the consequences of a nonunanimous verdict or as to its ability to report such a verdict. The challenged instruction is not, therefore, constitutionally infirm. *Boyde*, 494 U.S. at 380.

Competency. On direct appeal, the defendant challenged the trial court's finding that he was competent to be tried. We found no error. *Benn*, 120 Wn.2d 661-62. The

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[18] This issue could be avoided in future cases by offering the jury only two possible responses--"yes" and "no or unable to agree."

defendant now contends the definition of competency this court applied violates the federal constitution. This court applied the same definition the Supreme Court adopted in *Drope v. Missouri*, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). That is, "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope*, 420 U.S. at 171; *Benn*, 120 Wn.2d at 662. Moreover, the trial court's finding of competency does not turn upon what definition of competency one adopts but, rather, on the court's conclusion that the defendant was malingering. A fabricated mental defect is not "incompetence" under any definition of that term.

Jury Waiver. The defendant challenges RCW 10.95.050(2), which says a jury shall decide matters presented in the special sentencing proceeding "unless a jury is waived in the discretion of the court and with the consent of the

defendant and the prosecuting attorney" The defendant's attempted waiver of a jury was ineffective because the State would agree to a bench trial only in the guilt phase, and the defendant preferred to "go with the jury for the whole thing" under those circumstances. Report of Proceedings at 3. The defendant concedes there is no constitutional right to a nonjury trial. *Singer v. United States*, 380 U.S. 24, 85 S. Ct. 783, 13 L. Ed. 2d 630 (1965); *Rupe*, 108 Wn.2d 734. He claims the State cannot, consistent with the Equal Protection Clause, give the prosecuting attorney authority to veto jury waivers only in capital cases.

We rejected similar challenges to a former statute that entirely precluded jury waivers in first degree murder cases. *State v. Ferrick*, 81 Wn.2d 942, 945, 506 P.2d 860 (1973); *State v. Boggs*, 80 Wn.2d 427, 433-34, 495 P.2d 321 (1972); *State v. Baker*, 78 Wn.2d 327, 474 P.2d 254 (1970). As the court explained in Boggs:

> [T]he basic constitutional right that is protected is the *right to have a trial by jury*. In *Baker* we

> rejected the argument that the foregoing statutes, which extend and preserve that right, could simultaneously be considered an invidious discrimination violative of the Fourteenth Amendment.

Boggs, 80 Wn.2d at 433-34.

The statute at issue here is somewhat different from the former statute in that it allows a defendant to waive a jury if the State consents. The present statute still both extends and protects the constitutional right to a jury trial, however, and the manner in which it does so is no more "invidious discrimination" than the former version.

Hanging. The defendant contends that hanging constitutes cruel and unusual punishment. This court and the Ninth Circuit have both rejected this contention. *In re Personal Restraint of Lord*, 123 Wn.2d at 325-26; *State v. Campbell*, 112 Wn.2d 186, 191, 770 P.2d 620 (1989); *Campbell v. Wood*, 18 F.3d 662, 683 (9th Cir. 1994). Moreover, the Legislature recently amended the death penalty statute to require that death sentences be carried out by lethal injection unless the defendant affirmatively elects hanging. RCW 10.95.180(1), as amended

by Laws of 1996, ch. 251, § 1.[19] The defendant has not made that election and is therefore not facing a method of execution he believes to be cruel. He therefore lacks standing to raise this issue.

Notice. The defendant claims he was not properly served with the notice of intent to seek the death penalty. This argument is unsupported. The notice was served within 30 days after arraignment by delivering a copy to defense counsel's receptionist. Leaving notice at defense counsel's office satisfies both constitutional and statutory notice requirements. *State v. Cronin*, 130 Wn.2d 392, 923 P.2d 694 (1996); RCW10.95.040.

Reference Hearing. The defendant claims the superior court made several erroneous evidentiary rulings at the reference hearing.

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[19] Retroactive application of a change in the method of execution does not violate the Ex Post Facto Clause where the change is to a more humane method. *Malloy v. South Carolina*, 237 U.S. 180, 35 S. Ct. 507, 59 L. Ed 905 (1915), *cited in Weaver v. Graham*, 450 U.S. 24, 32-33 n.17, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

He first contends the court improperly excluded his statement in his allocution that Mr. Patrick "kept me from suicide in the Pierce County Jail" and then "told me things about my case that I don't know where he got them from." Report of Proceedings at 2279. The defendant's allocution was both unsworn and hearsay. Allegations supporting a personal restraint petition must be proven by "competent, admissible evidence." *In re Personal Restraint of Lord*, 123 Wn.2d at 303.

The defendant also wanted to present evidence that the fire in his trailer was not deliberately set. Although his evidence regarding the fire was not hearsay, it was irrelevant. The defendant claims that proving the fire was accidental was relevant to show that Mr. Patrick was lying about the defendant's alleged confession. We ordered the reference hearing to resolve three specific questions. The question involving Mr. Patrick related to the defendant's claim that Mr. Patrick was acting as a police agent when the two were jailed together. Neither the existence nor the content of the

defendant's statement to Mr. Patrick was relevant to that question. The fire evidence would have been, at best, impeachment on a collateral issue. The superior court properly excluded it.

The defendant also challenges the superior court's exclusion of several pieces of evidence offered to prove Mr. Patrick was a government agent and the superior court's exclusion of hearsay statements. These rulings were appropriate.

As discussed above, the issue before the superior court was whether there was at least an implicit agreement between Mr. Patrick and police officers or prosecutors with respect to his relationship with the defendant. The defendant was permitted to question the prosecutors, police officers and jailers who had any knowledge about his case and Mr. Patrick's role in it. The evidence the superior court excluded did not involve the defendant or Mr. Patrick specifically and had little, if any, bearing on Mr. Patrick's status as a government agent in the

defendant's case. The defendant's attempt to introduce evidence of "rumors" was inadmissible hearsay. *In re Personal Restraint of Lord*, 123 Wn.2d at 303.

The superior court also excluded evidence regarding Tacoma police officers' unwillingness to talk to defense counsel before the hearing, evidence that Mr. Patrick hit his wife, and evidence that Mr. Patrick had been found not to be a reliable informant. The defendant claims this evidence was relevant to the credibility of the State's witnesses and, thus, inferentially supports his claim that Mr. Patrick was a government agent. The defendant had the burden of proving Mr. Patrick was a government agent. Defense counsel found no witnesses who would testify that there was an agreement under which Mr. Patrick would obtain evidence from the defendant, or that the defendant was deliberately placed in the same part of the jail as Mr. Patrick. There would still be no such evidence even if the State's witnesses were impeached to the extent the defendant wished. Impeaching a witness negates the witness's

testimony; it does not provide any substantive support for the contrary proposition.

The defendant complains that the superior court excluded evidence indicating that documents from searches in the defendant's case were lost or destroyed. The defendant claims this evidence was relevant to show the warrant for his "cell" was deliberately destroyed. That issue is not material to any of the questions listed in the remand order. Also, as discussed above, the only trial exhibits seized pursuant to that warrant were removed from Mr. Patrick's cell. Since the defendant cannot challenge admission of those items, the existence, destruction, and validity of the warrant are irrelevant.

The defendant also complains that the superior court examined and then sealed "a one-page document" from Deputy Prosecutor Johnson's "trial notebook." Report of Proceedings (reference hearing) at 1087. The superior court said this page "is work product, in that it reflects his personal preparation for

trial, so I'm not going to be turning this over." Report of Proceedings (reference hearing) at 1087. We agree. The defendant has not shown a substantial need for disclosure of Mr. Johnson's notes. Mr. Johnson was available to and did testify about all matters on which we ordered the reference hearing. *See McKenzie v. McCormick*, 27 F.3d 1415, 1420 (9th Cir. 1994) (upholding work product privilege in capital case because prosecutors were available to testify). Mr. Johnson testified that he did not hear of Mr. Patrick's existence until after Mr. Patrick had contacted Detective Reinicke from the jail. Mr. Johnson also described the benefits Mr. Patrick received for his information--a three-month reduction in his arson sentence, and food and lodging while he was present to testify. Nothing in the sealed document either contradicts Mr. Johnson's testimony or is otherwise helpful to the defendant. The document (Ex. 45) lists questions Mr. Johnson planned to ask Mr. Patrick and, apparently, some anticipated answers. It is clearly work product.

Perjured Testimony. The defendant claims the evidence presented at the reference hearing proves Mr. Patrick gave perjured testimony at trial. The Supreme Court has held that a "conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (footnote omitted). The defendant relies on a Ninth Circuit decision which applies this rule, "even if the government unwittingly presents false evidence." *United States v. Young*, 17 F.3d 1201, 1204 (9th Cir. 1994). Actually, there is a split of authority among the federal circuit courts on this issue. The Fourth Circuit applies a "knew or should have known" standard. *United States v. Kelly*, 35 F.3d 929, 933 (4th Cir. 1994). According to the Eleventh Circuit, "[i]t is axiomatic that only the knowing use of false testimony constitutes a due process violation." *United States v. Michael*, 17 F.3d 1383, 1385 (11th

Cir. 1994). That is also the rule in the Seventh Circuit. *Shore v. Warden, Stateville Prison*, 942 P.2d 1117, 1122 (7th Cir. 1991). We have held that due process analysis is triggered only if there has been a "knowing use of perjured testimony." *In re Personal Restraint of Rice*, 118 Wn.2d at 887 n.2. In light of that holding, the defendant's reliance on the Ninth Circuit case is misplaced. *In re Personal Restraint of Grisby*, 121 Wn.2d 419, 430, 853 P.2d 901 (1993) (Ninth Circuit's constitutional holdings are not binding on this court).

Under *Rice*, the defendant must show that the State knowingly used perjured testimony. Since the remand order did not refer to this issue, the superior court did not enter any findings of fact regarding either the accuracy of Mr. Patrick's trial testimony or the State's knowledge of its truth or falsity.[20] There is no need to resolve those issues, however, unless there is a reasonable likelihood the allegedly false testimony could

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[20] This issue was raised for the first time in the supplemental brief filed by the defendant following the reference hearing. See note 3, supra at 884.

have affected the judgment of the jury. *Agurs*, 427 U.S. at 103. The defendant claims Mr. Patrick lied about his criminal history, drug use, reasons for leaving the state, and the payments he received from the State. These matters are relevant to Mr. Patrick's credibility. Still, defense counsel was able to cross-examine Mr. Patrick about his long history as a paid informant in drug cases, at least two prior convictions, the reduction in his arson sentence, and the fact that the State was paying his motel and food bills. Mr. Patrick's alleged perjury may have affected the degree to which his credibility was impeached, but it did not prevent the defendant from impeaching him on each of these issues. Moreover, Mr. Patrick's testimony about the key aspects of the defendant's confession was corroborated by other evidence. Whether or not the fire was deliberately set, the defendant did receive insurance proceeds for items which were not destroyed in the fire, and some of those items were found in victim Dethlefsen's home. Mr. Hastings confirmed Mr. Patrick's claim that he, and

not Mr. Benn, was named as beneficiary in victim Dethlefsen's will. Furthermore, the defendant's fingerprint was on one of the maps Mr. Patrick said he drew. The defendant also allegedly confessed several times to his brother, Monte, and one of those confessions provided at least some motive for a premeditated killing. There is no reasonable likelihood the assertedly false aspects of Mr. Patrick's testimony affected the jury's verdict in either phase of trial.

Motion to Supplement. The defendant moves to supplement his petition to challenge the trial court's self-defense instruction on the ground that one sentence in the instruction is erroneous under this court's decision in *LeFaber*, 128 Wn.2d 896. He also contends his trial counsel represented him ineffectively by requesting that language.[21]

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[21] The instruction allowed the jury to find self-defense if the defendant reasonably believed the victim intended to inflict death or great personal injury and there was imminent danger of such harm being accomplished. Washington law requires only that the defendant have a reasonable fear of imminent danger. *State v. LeFaber*, 128 Wn.2d 896, 901-02, 913 P.2d 369 (1996).

With limited exceptions, postconviction challenges must be brought within one year after a conviction becomes final. RCW10.73.090, .100. The defendant's conviction became final in November 1993, when the Supreme Court denied his petition for certiorari. RCW 10.73.090(3)(c). His personal restraint petition was timely filed in August 1994. The motion to supplement, raising the *LeFaber* issue, was not filed until June 1997, well after the statute of limitation expired. There is no provision in the rules of appellate procedure similar to CR 15(c) which allows amendments to relate back to the date of the original pleading; indeed, there is no provision at all regarding amendments to personal restraint petitions.[22] The defendant, instead, relies on RAP 18.8(a), which says the appellate court may "waive or alter the provisions *of any of these rules* and enlarge or shorten the time within which an act must be done . . . ." (Emphasis added.) The defendant is not

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[22] CR 15 itself does not apply to the filing or amendment of personal restraint petitions because the civil rules "govern the procedure in the superior court . . . ." CR 1.

seeking a waiver of a court rule, however, but of a statute of limitation. RAP 18.8(a) does not allow the court to waive or alter statutes.

Some types of postconviction claims are exempt from the statute of limitation. *See* RCW10.73.100. The defendant's direct challenge to the self-defense instruction would be exempt if *LeFaber* represents a "significant change in the law" and "sufficient reasons exist to require retroactive application of the changed legal standard." RCW 10.73.100(6). If *LeFaber* is a significant change in the law, however, the defendant's ineffective assistance claim would fail on the merits because counsel could not be faulted for failing to anticipate such a change. If *LeFaber* is not new, a direct challenge to the instruction would be untimely.[23] The defendant's ineffective assistance claim based on counsels' failure to challenge the instruction would also be time-barred because such claims are

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[23] None of the other exemptions listed in RCW 10.73.100 even arguably applies.

not exempt from the statute of limitation under RCW10.73.100.

As for the challenge to the instruction itself, we did not overrule any of our prior decisions in *LeFaber* but, rather, applied the "well-settled" rule that a defendant may claim self-defense based on his "subjective, reasonable belief of imminent harm from the victim." *LeFaber*, 128 Wn.2d at 899. We also noted that the same instruction had withstood several other constitutional challenges. *LeFaber*, 128 Wn.2d at 900. Even if this latter observation means *LeFaber* significantly changed the law, new rules should not be applied retroactively on collateral review unless they place certain kinds of conduct beyond the power of the State to proscribe or punish, or establish procedures inherent in the concept of ordered liberty. *In re Personal Restraint of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992). Our holding regarding the wording of self-defense instructions does neither of those things. Thus, to the extent *LeFaber* could be seen as a change in the law, it does not apply

retroactively to cases that were final before it was decided. Accordingly, the instructional issue the defendant seeks to raise is barred by the statute of limitation.

Even if we could allow the defendant to raise this issue now, he would not be entitled to relief based on the instructional error.[24] He relies on our holding in *LeFaber* that the erroneous instruction was presumptively prejudicial. *LeFaber*, 128 Wn.2d at 900. The issue was raised on direct appeal in *LeFaber*, however. There is no presumption of prejudice when an instruction is challenged in a personal restraint proceeding. *See St. Pierre*, 118 Wn.2d at 328-29. The petitioner "must show the error worked to his actual and substantial prejudice in order to prevail." *St. Pierre*, 118 Wn.2d at 329. Moreover, the defendant cannot complain of any error invited by proposing the instruction except in the context of an

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[24] The untimeliness of this claim is an adequate and independent basis for denying the defendant's motion to supplement his petition. *See Harris v. Reed*, 489 U.S. 255, 264 n.10, 109 S. Ct. 1038, 103 L, Ed. 2d 308 (1989). Once again, our observation that an untimely claim is also meritless is not to be taken to suggest we would, or could, disregard the statute of limitation and grant relief based on a time-barred claim.

ineffective assistance claim, which also requires a showing of prejudice. *Gentry*, 125 Wn.2d at 646-47. As discussed above, the physical evidence refuted any plausible claim of self-defense. The failure of the instructions to clarify the subjective nature of the defense therefore could not have affected the verdict. The defendant was not actually and substantially prejudiced by the erroneous portion of the instruction.

CONCLUSION

We have reviewed the trial transcript, the transcript of the reference hearing, and the superior court's findings of fact, as well as the parties' extensive legal briefs and the various documents appended thereto. The defendant has not shown that the ends of justice would be served by reconsidering any of the issues raised on appeal or that he was actually and substantially prejudiced by any of the numerous claimed errors. The issues raised in the motion to supplement are barred by the statute of

limitation. The defendant's personal restraint petition is therefore denied, as is the motion to supplement.

/s/ Guy

WE CONCUR:

/s/ Durham /s/ Madsen

/s/ Dolliver /s/ Alexander

/s/ Smith /s/ Talmadge

JOHNSON, J. (dissenting) - One of the reasons we ordered a reference hearing was to determine if Roy Patrick, a jailhouse informant to whom Benn allegedly confessed, was a State agent. I agree that was not established.

However, testimony from the reference hearing in relation to the State agent issue does show that the State's actions, taken together, deprived Benn of his Sixth Amendment right to confront and cross-examine Patrick. The State withheld information from Benn's attorneys prior to and during his trial that the State was under direct court order to produce. The

State violated the trial court's discovery order by failing to promptly provide a taped statement and documents received from Patrick regarding Benn's case. The State also violated a direct court order to produce information specific to Patrick's previous dealings with law enforcement officers.

Testimony from the reference hearing also shows the State failed to list Patrick as a State witness until the eve of trial and prevented Benn's attorneys from interviewing Patrick until the day before trial by erroneously claiming Patrick was involved in a witness protection program. The State's misconduct deprived Benn of his Sixth Amendment right to fully cross-examine Patrick. On this point, Benn's personal restraint petition should be granted and the case remanded for a new trial.

Sixth Amendment Right To Cross-Examine

Benn argues his Sixth Amendment right to cross-examine Patrick was denied by the State's actions described above. In his original appeal, Benn argued his right to cross-

examine Patrick was violated when the State failed to disclose that a search warrant for narcotics was executed on Patrick's motel room while Patrick waited to testify at Benn's murder trial. On this issue, the majority in Benn's original appeal held the State's failure to disclose the search warrant did not unduly restrict Benn's ability to cross-examine Patrick and, therefore, did not require reversal of Benn's conviction. *State v. Benn*, 120 Wn.2d 631, 650-51, 845 P.2d 289 (1993).

In Benn's original appeal, however, the State's last minute listing of Patrick as a State witness, the State's failure to timely turn over the information provided by Patrick to the State on January 20, 1989, and the State's action in preventing the defense team from interviewing Patrick by claiming Patrick was in a witness protection program were not addressed. The majority here frames the issue by stating:

> The defendant specifically claims that the State's failure to provide timely discovery, which interfered with defense counsel's ability to conduct effective cross-examination, is per se prejudicial. . . . Although we do not condone these discovery violations, the record does not

> support the dissent's conclusion that the defendant's constitutional rights were violated.

Majority op. at 902-03. The majority overlooks the other evidence and testimony Benn relies on to support his argument. When fully examined, that evidence and testimony establish that Benn was denied his right to cross-examine Patrick.

The Sixth Amendment to the United States Constitution and Const. art. I, § 22 provide a defendant with the right to "confront and cross-examine adverse witnesses." *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). With regard to this right, we have stated, "its denial or significant diminution calls into question the ultimate '"integrity of the fact-finding process"' and requires that the competing interest be closely examined." *State v. Boast*, 87 Wn.2d 447, 453, 553 P.2d 1322 (1976) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (quoting *Berger v. California*, 393 U.S. 314, 315, 89 S. Ct. 540, 21 L. Ed. 2d 508 (1969))). Whether a given defendant's confrontation right has been denied is determined on a case-by-case basis after

examining "all the circumstances and evidence." *Boast*, 87 Wn.2d at 453 (citing *United States v. Snow*, 521 F.2d 730, 734 (9th Cir. 1975)).

The majority, however, conducts no analysis of the circumstances and evidence regarding Benn's claim that he was denied an opportunity to effectively cross-examine Patrick by the State's actions listed above. Instead, the majority dismisses Benn's claim on the basis Patrick did not begin his testimony until five days after opening statements and concludes that because the record does not indicate any formal limitations were placed on defense counsels' access to Patrick. Patrick's last minute identification as a State witness did not deprive Benn of his right to effective assistance of counsel. Majority op. at 903-04 (citing *United States v. Hall*, 843 F.2d 408 (10th Cir. 1988); *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299 (1989)).[1] I disagree.

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[1] *State v. Charboneau* has been overruled by *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991).

Benn's claim that he was denied the opportunity to effectively cross-examine Patrick is also grounded in the State's failure to provide Benn's counsel with information about Patrick that the State possessed. There can be no question the State has a duty to disclose this information even without a court order.

CrR 4.7 outlines discovery obligations during criminal trials. Under that rule, the State is obliged to disclose "no later than the omnibus hearing: the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses." CrR 4.7(a)(1)(i). We have held that one of the principles underlying CrR 4.7 is to "afford opportunity for effective cross-examination," *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988) (quoting Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 77 (West 1971)). The State can make no credible argument that it

complied with or attempted to comply with CrR 4.7. Because the State failed to comply with CrR 4.7, Bonn's counsel was prevented from obtaining information about Patrick that they could have used to impeach Patrick's credibility. Thus, Benn's counsel was not afforded the opportunity for effective cross-examination as is contemplated by CrR 4.7 and *Yates*.

In addition to the State's duty imposed by CrR 4.7, on December 16, 1988, the trial court ordered the State to produce all "statements made by Defendant to . . . third parties . . .," the "names and addresses of Plaintiff's witnesses and their statements . . .," to "[p]ermit inspection and copying of any . . . documents . . . which the prosecution (a) [o]btained from or belonging to the Defendant, or (b) [w]hich will be used at the hearing or trial," to provide statements made by witnesses to the police, to "[s]upply the defense with copies of all tape recorded statements taken by the police . . .," and to "[p]rovide the defense with any and all measurements or diagrams made of the crime scene." Clerk's Papers at 33-34 (*State v. Benn*, 120

Wn.2d 631). On January 20, 1989, Patrick gave a taped statement in which he related numerous incriminating statements made by Benn to him when they shared a cell in the Pierce County Jail. Patrick also provided the State with various documents he obtained from Benn that were specifically related to the murder charges against Benn. Benn's first defense counsel, Raymond Thoenig, declared that he did not "become aware of Roy Patrick or his testimony until close to the time of trial." Personal Restraint Pet. app. 16 at 2 (Decl. of Raymond Thoenig). The final trial date was March 14, 1990, over one year after Patrick provided the incriminating information to the State.

The reference hearing testimony reveals the State did not promptly provide the above information, or Patrick's existence as a State witness, to Benn even though CrR 4.7 and the trial court's December 16, 1988 order required disclosure. Because Patrick was not on the State's witness list, Benn's counsel had no need to investigate for more specific

information on Patrick until the State finally disclosed its intent to call Patrick as a witness less than 24 hours prior to trial. In failing to timely provide this information and list Patrick as a State witness, the State violated CrR 4.7 and the trial court's order.

Benn's counsel first interviewed Roy Patrick on March 13, 1990, the day before trial began. At that interview, Benn's counsel first learned of Patrick's history as a paid informant. On the first day of trial, Benn's counsel moved for and the trial court ordered the State to disclose:

> [F]or the year prior to the date of the alleged crime and up until now, . . . any written material that you're able to procure from the various law enforcement officers with whom the confidential informant [Patrick] may have had contacts.

Report of Proceedings, vol. I at 58 (*State v. Benn*, 120 Wn.2d 631). The State claimed it would not be able to obtain that information until a Detective Lewis returned from out of town the next Monday. The trial court then set a deadline for the Wednesday after Detective Lewis returned.

Testimony at the reference hearing reveals the State made no attempt to comply with the trial court order. Detective Lewis testified he was never contacted by the Prosecutor's office for information or records on Patrick:

> Q: Were you aware of Gary Benn's trial in 1990?
> A: I recall reading something about it in the paper, but I don't know details, and I wasn't familiar with the case at all.
> Q: Were you ever approached by Pierce County prosecutor's [sic] for information about . . . Patrick at that time?
> A: No.
> Q: Did anyone [sic] of them [prosecutors] approach you and ask you for information about Roy Patrick at the time?
> A: No.
> Q: Did anyone ask you to dig up as many records as you could about Roy Patrick at that time?
> A: No.
> Q: This was in 1990. Back then, would your own personal files concerning Roy Patrick have been in existence? In 1990?
> A: Yes.

Personal Restraint Pet. Hr'g, vol. I at 145-46.

At the reference hearing Bonn's counsel testified the State responded to his "repeated requests for an interview" with

Patrick by stating Patrick was "unavailable" for an interview because he was in a witness protection program. *Id.*, vol. VIII at 1428. However, when asked whether he was in a witness protection program, Patrick was equivocal, stating, "No. Yes and no. I don't know really know. I was told I was, but I wasn't." *Id.*, vol. v. at 930. More importantly, at the reference hearing the State conceded Patrick was not in a witness protection program. *Id.*, vol. VIII at 1477. This testimony supports Bonn's argument that the State's actions deprived him of his ability to prepare for trial and, thus, an opportunity to fully cross-examine Patrick.

Nothing in the record indicates that Benn's defense counsel could have taken further action. The significance of Patrick's testimony cannot be overstated. Patrick testified as to Benn's confession and as to diagrams made by Benn regarding the murders. His testimony provided crucial evidence for the State. This court ordered a reference hearing because of its concern over the State's actions with regard to Roy Patrick. The

testimony from the reference hearing shows the court's concern was warranted. As such, Benn's personal restraint petition should be granted. He was denied the opportunity to fully examine a consequential State witness.

/s/ Johnson

/s/ Sanders (concurs)